Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-444

NORTHEAST MARINE TERMINAL COMPANY, INC.
and STATE INSURANCE FUND,

Petitioners,

—against—

RALPH CAPUTO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 1, 1976.

Opinions Below

The opinion of the Court of Appeals, printed in appendix A hereto, is not yet officially reported but is unofficially reported in 1976 A.M.C. 881. The decision of the Benefits Review Board, United States Department of Labor, printed in appendix B hereto, is reported in 3 BRBS 13. The decision and order of the Administrative Law Judge, United States Department of Labor, printed in appendix C hereto, is unreported but there is a synopsis in 2 BRBS 4.

Jurisdiction

The judgment of the Court of Appeals dated July 1, 1976, printed in appendix D hereto, was entered on July 1, 1976. An order of the Court of Appeals dated September 3, 1976 denying petition for rehearing is printed in appendix E hereto. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

When compensably injured, was respondent Caputo an "employee" as defined by § 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3)?

Statute Involved

The pertinent language in 33 U.S.C. 902(3) is: "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations * * *."[1]

Statement

Respondent Caputo, who sometimes worked for other employers as a longshoreman loading and discharging ships, was on April 16, 1973 employed by petitioner Northeast Marine Terminal Company, Inc.[2] as a terminal laborer to help a cargo consignee's truck driver load boxes of cheese inside the consignee's truck. The cheese had been discharged from a ship at least 5 days before, and thereafter stored inside a terminal warehouse awaiting pick up by the consignee. A forklift vehicle brought the cheese from the warehouse to the truck, which was parked more

[1] "The problem with which we are here concerned arises from Congress' failure to supply any definition of two terms in § 902 (3) —'engaged in maritime employment' and 'any longshoreman or other person engaged in longshoring operations'." (app'x A, p. 9a)

[2] Petitioner Northeast is a 33 U.S.C. 902(4) "employer" because some of its employees "are employed in maritime employment, in whole or in part, upon the navigable waters of the United States", as therein defined.

than 400 feet from the water but still inside the Brooklyn terminal[3], and put the cheese onto a dolly inside the truck. While Caputo was rolling the dolly, he tripped over a backstop on the truck floor, catching and injuring his foot under the dolly. It is stipulated that the work Caputo was doing when injured was the same, and entailed the same risk of injury as exists wherever and by whomsoever trucks are loaded or unloaded with dollies.

Contending that Caputo's injury was compensable only under New York law, petitioners contested Caputo's Federal compensation claim, which was referred to Administrative Law Judge Howder for hearing, pursuant to 33 U.S.C. 919(d) and 20 C.F.R. 702.331, et seq. Petitioners appealed Judge Howder's decision and order sustaining Caputo's claim (app'x C) to the Benefits Review Board, pursuant to 33 U.S.C. 921(b), and appealed the Board's decision affirming Judge Howder (app'x B) to the United States Court of Appeals for the Second Circuit, pursuant to 33 U.S.C. 921(c).

The Court of Appeals, Judge Lumbard dissenting, affirmed the Board[4] but in footnote 13 (app'x A, p. 24a) the majority invited a petition for rehearing to remand for additional fact findings if "one or more of the other circuits seized of this problem should order such a remand". In an as yet unreported opinion[5] filed on August 5, 1976, *Sea-Land Services, Inc.* v. *Johns,* (3 Cir. No. 75-2039), the

[3] The situs of Caputo's injury met the requirements of 33 U.S.C. 903(a) because the terminal adjoins navigable waters and parts of the terminal are used in loading and unloading ships.

[4] Petitioners' appeal was consolidated for argument with three others, and in a single opinion the Court of Appeals dismissed one petition as untimely and another as moot and denied the other two on the merits (app'x A, p. 45a). The other employer whose petition was denied on the merits, International Terminal Operating Co., Inc., is also petitioning this Court for a writ of certiorari.

[5] Before this petition is distributed to the Court for its consideration, petitioners will file a supplemental brief citing any reports of as yet unreported decision herein referred to, and appending copies of those still unreported.

United States Court of Appeals for the Third Circuit remanded a Benefits Review Board decision for additional fact findings. Under compulsion of footnote 13 in the majority opinion below, petitioners filed a petition for rehearing but, because of the urgent need to obtain this Court's statutory interpretation, requested that rehearing be promptly denied, which it was (app'x E).

Reasons for Granting the Writ

The majority decision below, on an important question of Federal statutory coverage which has not been, but should be, settled by this Court, is in direct conflict with the majority decision in *I.T.O. Corp. of Baltimore* v. *Adkins,* 529 F.2d 1080 (4 Cir. 1975).[6] In *Nacirema Co.* v. *Johnson,* 396 U.S. 212 (1969), the Court granted certiorari to resolve conflicting coverage interpretations of the same statute, *ib.* p. 214, and the Court's opinion, *ib.* pp. 223-224, is believed to have been a catalyst for the 1972 statutory Amendments which petitioners seek to have this Court interpret.

In the majority opinion below, Judge Friendly confirmed the need for resolution by this Court of the conflicting decisions on the important question presented:

> "[The petitions] present a question of considerable importance, namely, how far the 1972 Amendments extended the coverage of [the Longshoremen's and Harbor Workers' Compensation Act]. * * * Given the importance of the question, the number of courts of appeals endeavoring to find an answer, and the divergence

[6] The appeal in *Adkins* was consolidated for argument with two others, and in a single opinion the Court, Judge Craven dissenting, reversed the Benefits Review Board in all three cases. "Because of the importance and novelty of the questions decided, the entire court granted cross-petitions for rehearing and reheard the appeal in banc" on May 4, 1976 before six judges. In an as yet unreported in banc opinion decided August 26, 1976 (4 Cir. No.'s 75-1051, 75-1075, 75-1196), four judges affirmed the original panel's decision in *Adkins* and, by a tie vote, affirmed the Board in the other two cases.

> of opinion already manifested, it seems unlikely that the opinion of any court of appeal will be the last word to be said." (app'x A, pp. 3a-4a)

In an as yet unreported opinion filed July 27, 1976, *Stockman* v. *John T. Clark & Son of Boston, Inc.,* (1 Cir. No. 75-1360), the Court after noting that the petition "raises a difficult question of interpreting the 1972 amendments * * * [which] * * * arises from the essential ambiguity of the 1972 amendments insofar as they describe, or fail to describe, the employees for whom coverage is afforded" and that "judicial decisions to date construing the 1972 amendments reflect a sharp difference of opinion over the reach of the Act", observed: "From the present judicial melange can be gathered the truth of Judge Friendly's [quoted] remark". In the as yet unreported *Johns* opinion, *supra,* p. 3, the Court wrote: "Nor are we certain that the Board has properly interpreted the scope of the 1972 amendments, a task of no little difficulty as several diverging opinions demonstrate", citing the decision below, *Adkins,* and *Weyerhaeuser Co.* v. *Gilmore,* 528 F.2d 957 (9th Cir. 1976), petition for certiorari filed May 6, 1976 *sub nom. Gilmore* v. *Weyerhaevser Co.,* 44 U.S.L.W. 3645 (U.S. No. 75-1620).[7] In his brief on petition for certiorari in *Gilmore* which, unlike this petition and others soon to be filed, concerns an injury which occurred on water rather than ashore, the Solicitor General, who did not oppose the petition, advised the Court (brief, pp. 8-9):

> "The new shoreside coverage of the Act has produced a great deal of litigation, however, and there is already

[7] The difficulty in interpreting the scope of the 1972 Amendments is perhaps further indicated by the fact that consolidated appeals from awards to two appellees who claim to be 33 U.S.C. 902(3) "person[s] engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations" have been *sub judice* by the United States Court of Appeals for the Fifth Circuit since argument on March 15, 1976; ***P. C. Pfeiffer Co., Inc.*** **v. *Ford,*** **(5 Cir. No. 75-2289), and *Ayers Steamship Co.* v. *Bryant,* (5 Cir. No. 75-4112).**

> a conflict among the circuits concerning the meaning of 'maritime employment' as applied to injuries on land. • • • [citing the opinion below, *Adkins, Johns* and *Stockman*] • • • Other cases involving similar issues have been argued in the Fifth Circuit. Many more such cases are pending (but have not yet been argued) in the Second, Third, Fifth, and Ninth Circuits."

The majority decision below directly conflicts in two important respects with the majority decision in *Adkins,* which held that a forklift driver moving brass tubing which had been discharged from a ship 7 days before and, after being removed from the container inside which it had been shipped, stored in a terminal warehouse 685 feet from the water for 4 days awaiting pick up by the consignee, was not entitled to compensation under the 1972 amendments for injury sustained while moving the tubing from the storage warehouse and loading it onto the consignee's truck, 529 F.2d, p. 1082. Construing "maritime employment", "longshoreman", and "persons engaged in longshoring operations" as used in 33 U.S.C. 902(3), *ib.* p. 1084, the *Adkins* majority concluded "that the Act's benefits extend only to those persons, including checkers, who unload cargo from the ship to the first point of rest at the terminal or load cargo from the last point of rest at the terminal to the ship", *ib.* p. 1081, and that although Adkins had sometimes worked as a longshoreman loading and unloading ships, "the status of his employment is to be determined as of the time of the accident—not by what his previous duties may have been", *ib.* p. 1088, fn. 4, citing, *ib.* p. 1084, *Parker* v. *Motor Boat Sales,* 314 U.S. 244, 247 (1941), and *Pennsylvania R. Co.* v. *O'Rourke,* 344 U.S. 334, 340 (1953). Although Judge Lumbard agreed with the *Adkins* "point of rest" coverage delineation (app'x A, pp. 45a-46a), the majority below opined that the inclusion of "any longshoreman" in 33 U.S.C. 902(3) "alone is sufficient to condemn the 'point of rest' doctrine" (app'x A, p. 34a) and that if Caputo's "injury had occurred while he was moving the boxes of cheese from a previous position on the pier to the consignee's trucks, he clearly would have been engaged in 'unloading,' in the way that term is used in ordinary speech.[8] That being so, it would be wholly artificial to draw a distinction because his injury occurred while he was inside the consignee's truck." (app'x A, p. 39a). "We therefore hold that the Amendments at least cover all persons meeting the situs requirements • • • [who] • • • are engaged in the handling of cargo up to the point where the consignee has actually begun its movement from the pier (or in the case of loading, from the time when the consignee [*sic.*] has stopped his vehicle at the pier), provided • • • the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel." (app'x A, p. 42a). Thus, as summarized in *Stockman, supra* p. 5: "A divided second circuit panel has rejected altogether the fourth circuit's point of rest approach", which *Stockman* also rejected in favor of Judge Friendly's analysis, deemed "not only persuasive but compelling."[9]

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[8] In the as yet unreported in banc *Adkins* opinion, Judge Widener concurred with the original panel's decision because: "The cargo was no longer being unloaded from the ship but was in the process of being loaded into a delivery truck. Adkins, in Judge Widener's view, was thus not covered because he was not participating in the unloading process; he was handling the goods for transshipment."

[9] The conflicts between and within courts of appeals are not limited to the § 2(3) status requirement which the majority's construction below "goes some way" in reading out of the Act (app'x A, p. 42a), but which *Stockman* thought "has become a matter of considerable significance" and *Gilmore* held requires that "an employee's employment must have a realistic relationship to the traditional work and duties of a ship's service employment", 528 F.2d, p. 961, a construction which the Solicitor General's brief on certiorari, p. 6, considers insupportably narrow. The decision below (app'x A, p. 42a) and *Adkins,* 529 F.2d, pp. 1083-1084, hold that the claimant must satisfy the § 3(a) situs test, while *Johns* holds that: "As long as the employment nexus (status) with maritime activity is maintained, the federal compensation remedy should be

Although the Court might hesitate to grant this petition because of Judge Friendly's remarks on the unsatisfactory state of the record (app'x A, p. 22a), there are off-setting considerations. Many of Judge Friendly's queries pertain to loading ("stuffing") and unloading ("stripping") shipping containers, an activity with which this petition is not directly concerned. Others are answered by legislative history and by decisions cited in this petition, and cases therein cited. Some are immaterial to determination of the question presented. The Court will shortly have before it petitions for certiorari to review the decision below in the consolidated case of *Blundo* v. *International Terminal Operating Co., Inc.,* (2 Cir. No. 75-4249), and to review the decisions consolidated with *Adkins* entitled *Maritime Terminals, Inc.* v. *Brown,* (4 Cir. No. 75-1075), and *Maritime Terminals, Inc.* v. *Harris,* (4 Cir. No. 75-1196). The Solicitor of Labor is understood to have recommended certiorari in *Adkins.* Any deficiencies in petitioners' record would be cured by the records in those

available. * * * It is the situs of the vessels in maritime commerce, not the situs of their maritime employees at the time of injury, that in our view Congress referred to by its reference to navigable waters." There are disagreements on whether the § 20 presumption is entitled to any weight when construing the Act, *cf. Adkins,* 529 F.2d, p. 1091, *Stockman,* and the decision below (app'x A, pp. 24a-25a); whether decisions by the Board are entitled to any deference when construing the Act, *cf. Adkins,* 529 F.2d, pp. 1091-1093, *Stockman,* and the decision below (app'x A, pp. 26a-29a); and whether it is necessary to examine the legislative history to construe the Act, *cf. Adkins,* 529 F.2d, pp. 1084-1087, 1090-1081, 1097, *Stockman,* and the decision below (app'x A, p. 32a). There is even disagreement as to whether and, if so, which agency of the Department of Labor is a proper party on appeal, *cf. Adkins,* 529 F.2d, pp. 1081-1082, 1089, and the decision below (app'x A, pp. 12a-14a, n. 5). As truly said in a September 10, 1976 article in The Journal of Commerce (Vol. 329, No. 23,785, pp. 10-11) entitled Dock Compensation Act High Court Test Looms, "only the Supreme Court of the United States can resolve the murkiness and uncertainty of the amendments' language. * * * It's a costly and time-consuming process, but this is what happens when a badly written law spreads confusion in a complex and volatile labor-management relationship."

other cases, which could be consolidated for briefing and argument, as in the *Permian Basin Area Rate Cases,* 390 U.S. 747, 755 (1968).

Expeditious determination by this Court of the scope of § 2(3) is vitally important to petitioners, and to more than 75 other terminal and stevedore companies and their compensation carriers. It is virtually impossible to obtain §§ 14(f), 21(c) stay of compensation award payments pending review. Since the 1972 Amendments, petitioners, *et al.* have been compelled to make thousands of questionable compensation payments totalling many millions of dollars, most of which cannot be recovered even if the Court decides that such recipients are not entitled to Federal compensation. The "drain on the employer's resources * * * [and] * * * overriding purpose of the 1972 amendments * * * to strictly limit the liability of the stevedore in order to husband its resources, and its insurance carrier's resources, for payment of the increased benefits under the Act", *Cella* v. *Partenreederei MS Ravenna,* 529 F.2d 15, 20 (1 Cir. 1975), cert. den. —— U.S. ——, 96 S. Ct. 2175 (U.S. No. 75-1361, May 19, 1976), are proper considerations.

Conclusion

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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WILLIAM M. KIMBALL
Counsel for Petitioners

New York, N. Y.
September 24, 1976

APPENDICES

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1004, 1014, 1044, 1111—September Term, 1975.

(Entered July 1, 1976.)

Docket No. 76-4042

PITTSTON STEVEDORING CORPORATION and
THE HOME INSURANCE COMPANY,
Petitioners,

v.

ANTHONY DELLAVENTURA,
Respondent,

and

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, U.S.D.L.,
Party in Interest.

Docket No. 76-4009

NORTHEAST MARINE TERMINAL COMPANY, INC.,
Employer

and

STATE INSURANCE FUND, Carrier,
Petitioners,

v.

RALPH CAPUTO, Claimant

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Docket No. 76-4043

PITTSTON STEVEDORING CORPORATION,

Petitioner,

v.

JOHN SCAFFIDI,

Respondent.

Docket No. 75-4249

CARMELO BLUNDO,

Claimant-Respondent,

v.

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,

Self-Insured Employer-Petitioner,

DIRECTOR OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Before:

LUMBARD, FRIENDLY and OAKES,

Circuit Judges.

Petition to review four orders of the Benefits Review Board granting awards under the Longshoremen's and Harbor Workers' Compensation Act.

One petition is dismissed as untimely and a second as having been mooted by payment of the award by the insurance carrier; the other two awards are affirmed.

FRIENDLY, *Circuit Judge:*

We have here four petitions under 33 U.S.C. § 921(c) by employers, in some instances joined by their insurance carriers, to review orders of the Benefits Review Board (BRB) affirming compensation awards made to four employees under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972, 33 U.S.C. §§ 901 et seq.[1] They present a question of considerable importance, namely, how far the 1972 Amendments extended the coverage of LHWCA.

Presented with the same general issue, a divided panel of the Fourth Circuit ruled in favor of the employers,

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[1] The Benefits Review Board was created by the 1972 Amendments to the LHWCA as an independent, "quasi-judicial" body within the Department of Labor. 33 U.S.C. § 921(b)(1); 20 C.F.R. § 801.103 (1975). Its three members are appointed by the Secretary of Labor, and it is "authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter," made by the administrative law judges who hear LHWCA claims in the first instance. 33 U.S.C. §§ 919(d), 921(b)(1) and (3) (as amended). Prior to the 1972 amendments, there was no administrative review procedure for LHWCA claims; cases were heard in the first instance by Deputy Commissioners and review was then had in the United States district courts. 33 U.S.C. § 921 (1970). Under the 1972 amendments cases are heard by an administrative law judge whose decisions are reviewed by the BRB, and appeals lie to the court of appeals directly from final orders of the BRB. 33 U.S.C. § 921(c).

I.T.O. Corporation of Baltimore v. *Benefits Review Board, U.S. Dep't of Labor and Adkins,* 529 F.2d 1080 (1975), holding that the Act extended benefits only to persons injured while unloading cargo from the ship to what the majority termed a "first point of rest," i.e., the first place where the cargo is deposited on a pier or terminal area after being unloaded, and to persons injured while loading cargo from the "last point of rest," 529 F.2d at 1081. The *I.T.O.* case has been reheard *en banc.* We are told that only one other circuit has construed the extended coverage provisions here at issue, *Weyerhaeuser Co.* v. *Gilmore,* 528 F.2d 957 (9 Cir. 1975), rehearing denied, Feb. 6, 1976, petition for cert. filed, No. 75-1620, 44 U.S.L.W. 3645 (U.S. May 6, 1976), a case we do not consider to be truly relevant, but that the issue here presented is *sub judice* in the First Circuit, *John T. Clark & Son of Boston, Inc.* v. *William Stockman,* No. 75-1360, argued Jan. 5, 1976, and in the Fifth Circuit. Given the importance of the question, the number of courts of appeals endeavoring to find an answer, and the divergence of opinion already manifested, it seems unlikely that the opinion of any court of appeals will be the last word to be said. In consequence we shall not dwell on the long history of the problem of affording appropriate remedies for longshoremen and harbor workers against their employers which had its inception in *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205 (1917)—a history which is interestingly traced in Gilmore & Black, The Law of Admiralty §§ 6-45 to -49 (2d ed. 1975)—but will proceed directly to the cases in hand.

I. *The 1972 Amendments*

The situation that led to adoption of the 1972 Amendments was described as follows in the portion of the Senate

Report headed "Need for the Bill," S. Rep. No. 92-1125, 92d Cong., 2d Sess. 4-5 (1972):

> Since 1946, due to a number of decisions by the U.S. Supreme Court, it has been possible for an injured longshoreman to avail himself of the benefits of the Longshoremen's and Harbor Workers' Compensation Act and to sue the owner of the ship on which he was working for damages as a result of his injury. The Supreme Court has ruled that such ship owner, under the doctrine of seaworthiness, was liable for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore on theories of express or implied warranty, thereby transferring their liability to the stevedore company, the actual employer of the longshoremen.
>
> The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers.
>
> For a number of years representatives of the employees have attempted to have the benefit levels under the Act raised so that injured workers would be properly protected by the Act. At the same time, employer groups indicated their willingness to increase such payments but indicated they could do so only if the Longshoremen's and Harbor Workers' Compensation Act were to again become the exclusive remedy against the stevedore as had been intended since its passage in 1927 until modified by various Supreme Court decisions.

> The bill reported by the committee meets these objections by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and "hold harmless" or indemnity agreements. It continues to allow suits against vessels or other third parties for negligence. At the same time it raises benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act.

In practical terms the bill was a trade-off. See *Landon* v. *Lief Hoegh and Co., Inc.*, 521 F.2d 756, 761-62 (2 Cir. 1975), *cert. denied*, 96 S. Ct. 783 (1976). Stevedores and other employers were pushing for complete abolition of the three-way damage action possible under *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U.S. 85 (1946), which held longshoremen and other harbor workers to be "seamen" entitled to sue the ship for unseaworthiness, and *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), which permitted the shipowner to seek indemnity for any liability thus entailed from an injured worker's employer. This triangle in effect exposed the employer (already liable for and often having paid the limited benefits provided by the LHWCA) to an unlimited liability to the employee for damages and to the shipowner for its counsel fees in defending the employee's suit. The unions representing longshoremen and other harbor workers, which for years had been seeking increased benefits under the Act, opposed Congressional repeal of their *Sieracki*-created status as "seamen" in part on the grounds that the LHWCA's benefits were so low that workers needed the additional protection of the "unseaworthiness" doctrine. The compromise between these positions effected by the 1972 Amendments was this: The *Sieracki* action for unseaworthiness was eliminated, longshoremen in the future could sue the ship only for negligence, and employers were immunized from indemnity suits by shipowners. 33 U.S.C. § 905(b). In return, the workers were to secure increased benefits under LHWCA and, what is here pertinent, an extension of that statute's coverage. Thus the Senate Committee said that the principal purpose of the Amendments was "to upgrade the benefits, extend coverage to protect additional workers, provide a specified cause of action for damages against third parties, and to promulgate administrative reforms," Sen. Rep., *supra*, p. 1.

The change in the coverage section was dramatic. Before amendment the first sentence of 31 U.S.C. § 903(a) read:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

The Amendments altered this to read:

> Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock,

terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

In place of the definition of "employee" previously contained in § 902(3) as "not includ[ing] a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net," the Amendments defined the term as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

The definition of "employer," § 902(4)

> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

was modified by inserting after "navigable waters of the United States" the expansion of that term by the parenthetical phrase in § 903.[2]

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[2] The significance of this definition is that liability for compensation is predicated on being an "employer," 33 U.S.C. § 904.

Thus, under the Amendments there are two tests for coverage under the Act: a "situs" test requiring the injury to occur on the "navigable waters" as now defined, and a "status" test which requires that the employee be "engaged in maritime employment," etc. While the situs test has been liberalized, the creation of an employee status test adds a new element to the coverage requirements.[3] The problem with which we are here concerned arises from Congress' failure to supply any definition of two terms in § 902(3)—"engaged in maritime employment" and "any longshoreman or other person engaged in longshoring operations."

II. *The Facts*

Two of the cases before us, relating to claimants Blundo and Scaffidi, concern the loading or unloading of containers; the other two, relating to claimants Dellaventura and Caputo, involve loading of ordinary cargo into consignees' trucks on the pier.

(1) *Blundo.* Claimant Blundo was employed as a "checker" by the International Terminal Operating Co. (ITO).[4] He was injured while checking cargo being removed from a container at the 19th Street pier in Brooklyn when he walked around a draft containing cargo to mark it, slipped on some ice and fell. He was working on the stringpiece within 30 to 40 feet of the water. The container he was checking had been unloaded a few days

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[3] Formerly, if an employee was not expressly excluded, as, e.g., a crew member, his injury occurring upon the navigable waters was compensable under the Act so long as his employer had "any . . . employees . . . employed in maritime employment, in whole or in part . . . ." 33 U.S.C. § 902(4) (1970).

[4] A "checker" checks the contents of a container carrying goods for several consignees against the bills of lading or other records.

before at a different pier and then taken by a truckman over city streets to the 19th Street pier where it was opened by the United States Customs Office and then stripped. The Administrative Law Judge (ALJ) found that the 19th Street pier was not utilized by the employer for the actual loading or unloading of vessels but rather for the storage of commodities and for the "stripping, or stuffing, *i.e.*, loading or unloading of containers." The BRB affirmed his findings as to the employee's status and the situs of the accident and upheld a compensation award under the LHWCA.

(2) *Scaffidi.* Claimant Scaffidi was employed by Pittston Stevedoring Corp. as a "hustler" operator, a kind of trucker who moves containers within a terminal. On March 12, 1973, Scaffidi drove a hustler loaded with containers of cargo from the Columbia Street Pier in Brooklyn, New York, through some ten blocks of public streets to Pier 12. On arriving at Pier 12 he backed the container to a receiving platform on the dock in preparation for loading the container on to the ship. When the container was opened, a large case fell out and injured him. The BRB affirmed the findings of the ALJ on the ground that the operator of a hustler used to transport containers within a terminal is engaged in an essential step in the overall process of loading cargo aboard a vessel, which was maritime employment as contemplated in 33 U.S.C. § 902(3). It found that the fact that the container had been transported over public streets was irrelevant.

(3) *Dellaventura.* Claimant Dellaventura, employed by Pittston Stevedoring Corporation as a "sorter," was injured on June 27, 1973 at Pier 20 of the Pouch Terminal on Staten Island while helping to load a truck, belonging

to a consignee, with coffee bags which had been offloaded from the ship *"CAMPECHE"* on or about February 16, 1973. Dellaventura slipped on some loose coffee beans while inside the truck. At times Dellaventura's responsibilities included going into the holds of ships to assist in sorting and loading or off-loading cargo. The accident occurred about 30 feet from the water's edge on the pier. The record affords no explanation for the consignee's 133-day delay in picking up the bags of coffee beans, but the ALJ found that the pier contained no warehouse facilities. The BRB affirmed his decision on the grounds set forth in *Avvento* v. *Hellenic Lines,* BRB No. 74-153, 1 BRBS 174, 1975 A.M.C. 153 (Nov. 12, 1974), which held that " 'until cargo is delivered to a trucker or other carrier who is to pick it up for further trans-shipment, such cargo is in maritime commerce and all employees engaged in its movement to that point are engaged in maritime employment.' "

(4) *Caputo.* Claimant Caputo was usually employed as "terminal labor" by Pittston Stevedoring Corp. When there was no work available at Pittston, he would take a "shape up" job as a longshoreman wherever it was available and on the day of the accident was working for Northeast Marine Terminal Co., Inc. at their terminal adjoining the water in Brooklyn. He was injured while helping a cargo consignee's truckdriver load boxes of cheese, discharged from a vessel at least five days previously, inside the consignee's truck; the injury occurred while he was rolling a dolly loaded with the cheese on it into the truck. Caputo and the employer stipulated that the work he was doing when injured involved the same risk as would obtain wherever and by whomsoever trucks were loaded or unloaded with dollies. But the ALJ found the stipulation

lacked significance "in view of the situs where the injury actually occurred." The ALJ made an award in his favor and the BRB concurred.

III. *Motion to Dismiss Petitions in Dellaventura's Case as Untimely.*

Dellaventura and the Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor (OWCP), by his attorney, the Solicitor of Labor, have moved to dismiss the petitions of the employer, Pittston Stevedoring Corp., and its insurance carrier, The Home Insurance Co., as untimely. We grant Dellaventura's motion, thereby rendering it unnecessary to decide whether the Solicitor of Labor was entitled to make one.[5]

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[5] In the cases of Blundo and Caputo, petitioners named as a respondent the Director, Office of Workers' Compensation Programs in the Department of Labor; the petitions in Dellaventura's and Scaffidi's cases did not. The Director moved to amend the captions in the Dellaventura case, apparently for the primary purpose of enabling him to make the motion to dismiss; he made no similar motion to amend the caption in Scaffidi's case.

The issue whether the BRB should be a respondent in court of appeals review of its awards under 33 U.S.C. § 921(c) was treated in *McCord* v. *Benefits Review Board*, 514 F.2d 198 (D.C. Cir. 1975). There the BRB moved to dismiss the petition as to it. Petitioner did not oppose the motion and the court granted it, citing recent unreported decisions of the Ninth Circuit. The court reasoned that there was "sufficient adversity" between the claimant and the employer (or its insurance carrier) "to insure proper litigation without participation by the Board," that requiring the Board to participate "would parallel requiring the District Court to appear and defend its decision upon direct appeal" and that the presence of the second comma in 33 U.S.C. § 921(c) which reads:

> A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28.

indicated an intention that the Board should not be a party to the appeal. There were pending motions to substitute the Director,

The statute, 33 U.S.C. § 921(c), provides that a person adversely affected or aggrieved by a final order of the BRB may obtain review by the court of appeals for the circuit where the injury occurred "by filing in such court within sixty days following the issuance of such Board

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Office of Workers' Compensation Programs, U.S. Dept. of Labor (OWCP), as a respondent which were not before the court of appeals. In the *I.T.O.* case, *supra*, the Board moved to be dismissed as a respondent and to have the Director substituted; the court granted the first branch of the motion but denied the second, 529 F.2d at 1088-89.

With respect, we cannot subscribe to the view that Congress intended to create what to us would seem a novel form of review of federal administrative action in which no one representing the Government would be a party. See F.R.App.P. 15(a) ("In each case the agency shall be named respondent."). Prior to the 1972 Amendments judicial review took the form of a suit for an injunction in the district court against the deputy commissioner who made the order (former § 921(b)); in the absence of evidence of Congressional intent we find it hard to believe that, by providing internal review followed by an appeal to a court of appeals, Congress meant to oust the Government from further participation as of right. Appearance as an *amicus* may not be good enough, since it normally does not allow oral argument and never allows an appeal.

Neither the *McCord* nor the *I.T.O.* court discussed § 921a which provides:

> Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

The existence of sufficient adversity between private parties has not been thought to preclude the Government's right to be a party in many other sorts of review of federal administrative action. The second comma, especially in a sentence with an inappropriate first one, seems a slender reed; the "other parties" phrase means the other parties to the BRB review but does not rule out the BRB's being a party to review in the court of appeals. While Congress did not spell matters out with the same specificity as in 28 U.S.C. § 2348, we think it sufficiently indicated its intention that the BRB and other parties to the proceeding before the BRB should be parties to a review by a court of appeals under 33 U.S.C. § 921(c); if

order a written petition praying that the order be modified or set aside." The BRB's order was issued on October 9, 1975, but the petition for review was not filed until February 5, 1976.

Petitioners' basis for resisting the motion is as follows: The BRB's Rules and Regulations, 20 C.F.R. § 802.403(b), provide that the original of any BRB decision shall be filed with the Clerk of the Board, which was done here, and that "[a] copy of the Board's decision shall be sent

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the BRB chooses to leave the defense of its order in a particular case to the prevailing private party, it is free to do so.

The administrative regulations do not specify which branch of the agency should be represented as respondent on appeal. 20 C.F.R. § 801.402 seems to contemplate that the BRB is the proper agency respondent in court of appeals review, since it provides that "except in proceedings in the Supreme Court" the representation of the BRB is provided by the Solicitor of Labor. Moreover, § 921a quoted above seems to contemplate that the BRB be represented in court of appeals review. However, 20 C.F.R. 801.2 (a)(10) defines "party" and "party in interest" to include the "Secretary or his designee . . . ." This would indicate that the Secretary of Labor shall determine what officer represents the agency in the court of appeals. The Government's position has been that the Director, OWCP is the proper respondent. The OWCP is an administrative, not a statutory, creation. See 20 C.F.R. §§ 1.1 et seq., and § 701.203. And the Solicitor of Labor is authorized to appear and participate on behalf of the Director, OWCP as an interested party before the BRB. 20 C.F.R. § 702.333(b). However, in the section assigning to the OWCP the responsibility for administering various programs, including the LHWCA, the OWCP is given administrative authority "except [for] 921 as it applies to the Benefits Review Board . . . ." 20 C.F.R. § 1.2(d).

Trying to make sense out of these regulations, we think that while the Director, OWCP is a proper party before the ALJ or the BRB, see cases discussed in 3 *Larson, Workmen's Compensation Laws* § 83.19, at n. 49.1 (1976 ed.), the BRB is the proper agency respondent for review in the court of appeals, although the Solicitor of Labor could be designated to represent it. We deem it best to defer resolution of this question to a case where decision on this point is essential; perhaps in the meanwhile the Department will tidy up its regulations.

by certified mail or served personally on all parties to the appeal and the Director." The rule does not say when this should be done. Apparently no such notice was sent to the employer or the insurance carrier but the attorney who represented both parties before the BRB and in this court acknowledges that he received a copy within the 60-day period and does not deny that he advised his clients.

Like 28 U.S.C. § 2344 and similar provisions in the statutes for the review of orders of other agencies, 33 U.S.C. § 921(c) makes the time for seeking review start to run from the entry of the agency's order, even though the agency is under a duty to give notice. See *Willow Crossing Dairy Farm* v. *Hardin*, 327 F. Supp. 798 (W.D. Pa. 1970) (where review section of Agricultural Adjustment Act provided for filing of review petition within 20 days of "entry" of judgment, word "entry" is to be interpreted normally and petition filed September 28 to review order of September 2 was not timely and did not vest the court with jurisdiction even though counsel for plaintiff did not receive notice of ruling until September 8). The BRB's regulations count the 60-day period from the date on which the decision is "filed," 20 C.F.R. § 802.410.[6] In the parallel situation of review of judgments of district courts in civil cases Rule 4(a) of the Federal Rules of Appellate Pro-

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[6] In the only case construing the statutory provisions for mail notice to the parties of the Deputy Commissioner's decision under the old act, 33 U.S.C. § 919, the Deputy Commissioner's first order was apparently neither filed in his office nor mailed to the parties. The court held, in response to the employer's argument that a second, more generous award was barred by the first award, that the first order "did not take on the dignity of an effective award." *American Mutual Liability Ins. Co. of Boston* v. *Lowe*, 13 F. Supp. 906, 907 (D.N.J.), *aff'd*, 85 F.2d 625 (3 Cir. 1936). We believe this case to be wholly distinguishable particularly since both opinions rest primarily on the failure to file a *signed* order. 13 F. Supp. at 907 (citing *Howard* v. *Monahan*, 33 F.2d 220 (S.D. Tex. 1929)).

cedure likewise makes the entry of judgment the critical date; F.R.Civ.P. 77(d) directs the clerk to serve notice of the entry of a judgment or order but expressly provides that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure," namely, "upon a showing of excusable neglect."

We see no reason not to read 33 U.S.C. § 921(c) as meaning what it says. Cf. *United States* v. *Michel,* 282 U.S. 656 (1931); *American Construction Co.* v. *United States;* 107 F. Supp. 858 (Ct. Cl. 1952), *cert. denied,* 345 U.S. 922 (1953). The policy requiring that appeals be timely taken is so strong that ministerial failures by a clerk cannot be allowed to overcome it. The Act, like many other administrative review statutes, does not seem even to encompass the "excusable neglect" escape hatch provided for untimely appeals from the district courts. But even if it should be construed as doing so, this would be a most inappropriate case for granting relief. The clerk made the pardonable error of notifying the attorney rather than the parties, exactly what a clerk of a district court is directed to do, F.R.Civ.P. 5(b) and 77(d), and the attorney offers no explanation for having failed to file the petition within the allotted time.

IV. *Motion to Dismiss Petition in Scaffidi's Case as Not Presenting a Justiciable Controversy.*

In the proceedings up through the decision of the ALJ, the caption of this case named both Pittston and Gulf Insurance Company, its insurance carrier, as respondents;

both were represented by the same attorney. After the ALJ's decision the insurance carrier paid the award and chose not to contest it further. Pittston then engaged its present attorney who altered the caption. Apparently the claimant made no point before the BRB that the carrier's payment of the award mooted the case; he does now. Despite the general rule that objections not raised before an administrative body cannot be raised on review, we must consider this one since it goes to our jurisdiction.

We see no basis on which a reversal of the BRB's decision would enable the insurance carrier to recover from Scaffidi a payment the liability for which it chose not to contest, and Pittston, which was invited to file a reply brief on the issue, does not suggest one. Cf. *Federal Insurance Co.* v. *Detroit Fire & Marine Insurance Co.,* 202 F. 645 (6 Cir.), *cert. denied,* 229 U.S. 620 (1913) (insurer which paid its share of loss and failed to join other subrogated insurers in third party suit held entitled to recover ratable share of damages won). Pittston claims instead that it is nonetheless a "person adversely affected or aggrieved" by the BRB's order, 33 U.S.C. § 921(c), since the award will adversely affect its experience rating and thus increase its future premiums. Cf. *Travelers Insurance Co.* v. *Belair,* 284 F. Supp. 168 (D. Mass. 1968).

Pittston's contention that this interest affords it standing immediately encounters *Gange Lumber Co.* v. *Rowley,* 326 U.S. 295 (1945). The Court there held that the appellant-employer had failed to make a showing of substantial injury to any legally protected interest which would entitle it to question the validity under the due process clause of a state statute retroactively extending the time period in which workmen's compensation awards could be modified. Under the state's system, all awards

were paid out of a state insurance fund supported by employer contributions of "premiums." Rejecting the employer's argument that its future premium rates would be adversely affected by the increased award, the Court held that the effect of any one accident was too minimal and its possible injury to the employer too speculative to establish the justiciability of the case.[7]

The *Gange* decision, however, has been severely criticized by Professor Davis. He notes that under the state statute the employer was permitted to appeal, and characterizes the result as "unique," "the extreme one of denying the employer's standing even though the statute conferred such standing." 3 *Davis, Administrative Law Treatise* § 22.13, n.4 (1958). It may well be that under the more liberal concepts of standing developed in such cases as *Ass'n of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150 (1970), and *Barlow* v. *Collins,* 397 U.S. 159 (1970), *Gange Lumber Co.* would not be followed. However, even on the standing issue alone, an overruling of *Gange Lumber Co.* would hardly carry the day for Pittston on this record where it has submitted nothing but conclusory assertions of adverse effect on future premiums.[8]

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[7] *Gange Lumber Co.* was followed in *Railway Express Agency* v. *Kennedy,* 189 F.2d 801 (7 Cir.), *cert. denied,* 342 U.S. 830 (1951) (denying employer standing to challenge unemployment compensation payments to striking workers from federal fund). Cf. 2A *Larson, Workmen's Compensation Law* § 77.30 (1976 ed.) (damage action by employer against negligent third party for increased premiums would lie).

[8] There is no proof that payment of this one award would affect the premiums of such a large employer as Pittston. Moreover, we are not told whether the arrangements between Pittston and its insurance carrier allow the latter to take advantage of an award made without Pittston's consent in determining Pittston's ratings and, if so, whether a reversal by us would change matters.

However all this may be, the liberalization of notions as to what makes a person "adversely affected or aggrieved" does not eliminate the requirement that in order for a controversy to be justiciable, the court must be able to afford effective relief. See *Simon* v. *Eastern Kentucky Welfare Rights Org.,* —— U.S. ——, 44 U.S.L.W. 4724 (June 1, 1976); *Warth* v. *Seldin,* 422 U.S. 490, 504-05 (1975); *North Carolina* v. *Rice,* 404 U.S. 244, 246 (1971); *Local No. 8-6, Oil, Chemical & Atomic Workers Internat'l Union, AFL-CIO* v. *Missouri,* 361 U.S. 363, 367 (1960); *St. Pierre* v. *United States,* 319 U.S. 41, 42 (1943); *McKee* v. *Turner,* 491 F.2d 1106 (9 Cir. 1974). As indicated, Pittston has not claimed that Scaffidi will not retain his award even if we should reverse the BRB; what it is asking is simply an advisory opinion that the award should not have been made.[9] We do not doubt that where insurance only partially covers the liability, the employer may appeal from a judgment even though the insurer has paid its part. See *Moore* v. *Columbia Casualty Co.,* 174 F. Supp. 566 (S.D. Ill. 1959); *Queen Ins. Co. of America* v. *Meyer Milling Co.,* 43 F.2d 885 (8 Cir. 1930). But where the issue of liability is determined against an insured and its in-

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[9] *Jaabeck* v. *Theodore A. Crane's Sons Co.,* 238 N.Y. 314, 318 (1924), cited by the petitioner in its reply brief, is wholly inapposite. A state workmen's compensation board had entered an award against both the employer and its insurer, one of the questions determined by the board being that of the insurer's liability under the insurance contract. The Appellate Division affirmed the award as to the employer but reversed as to the insurer on the ground that the policy did not cover the risk. The employer appealed to the Court of Appeals, which reversed the Appellate Division with respect to the insurer, affirming in full the order of the State Industrial Board. The employer was clearly aggrieved by the order of the Appellate Division and the Court of Appeals gave effective relief by reinstating the order of the State Industrial Board.

surer, and the insurer pays the damages in full even without the consent of the insured and chooses not to appeal, the insured cannot appeal from the judgment against him. *Ross* v. *Stricker,* 153 Ohio St. 153, 91 N.E.2d 18 (1950), discussed in 19 *Couch on Insurance 2d* § 78.228. In short, as the Supreme Court has said, albeit in a different context, once an insurer "has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name." *United States* v. *Aetna Casualty & Surety Co.,* 338 U.S. 366, 380-81 (1949); *Link Aviation, Inc.* v. *Downs,* 325 F.2d 613 (D.C. Cir. 1963). See also *Zauderer* v. *Continental Casualty Co.,* 140 F.2d 211 (2 Cir. 1944). This seems a reasonable application of the general rule that a party who has no interest in a fund cannot appeal from an order disbursing the fund. *Seaboard Surety Co.* v. *United States,* 306 F.2d 855 (9 Cir. 1962), and cases cited at 306 F.2d at 859, n.6. We therefore dismiss Pittston's petition.[10]

V. *Interpretation of the Statute*

With these preliminaries out of the way, we can now undertake our main task—the interpretation of the coverage clauses of the 1972 Amendments.

Admitting as they must that the Amendments worked some extension of coverage, petitioners and the National Association of Stevedores (NAS), as *amicus curiae,* would limit this to factual situations generally comparable to

[10] An additional reason for this conclusion is that once the insurance carrier has paid, without preserving its right to recover the payment by taking an appeal, the case lacks the necessary quality of adversariness. We see no reason why a person in Scaffidi's position should bother to defend against a petition to review or why the BRB or the Director should spend the Government's resources in such a case, even though that was done here.

those in *Nacirema Operating Co., Inc.* v. *Johnson,* 396 U.S. 212 (1969). There the Court held that the Act, as it then stood, did not cover longshoremen killed or injured on a pier while attaching cargo from railroad cars to ships' cranes for removal to the ships, although coverage presumably would have existed had they been hurled into the water, *Marine Stevedoring Corp.* v. *Oosting,* 238 F. Supp. 78 (E.D. Va. 1965), *aff'd,* 398 F.2d 900 (4 Cir. 1968) (en banc),[11] or injured on deck while performing part of the same operation, *Calbeck* v. *Travelers Ins. Co.,* 370 U.S. 114 (1962). Resting its decision solely on statutory grounds, the Court said that "[t]he invitation to move" the line dividing the coverage of LHWCA "landward must be addressed to Congress, not to this Court," 396 U.S. at 224. Petitioners argue that the BRB's rationale in effect reads the "status" requirement out of the Act by affording coverage to any longshoreman injured on a pier no matter what he is actually doing when injured.

[11] *Nacirema Operating Co., Inc., supra,* reversed the *en banc* decision of the Fourth Circuit in *Marine Stevedoring Corp., supra.* Four cases were before the court of appeals in the consolidated appeal; in only three cases were petitions for *certiorari* filed and granted. Those three cases involved employees injured on the pier as described above whom the Deputy Commissioner had ruled were *not* covered by the LHWCA. The district courts had affirmed the Deputy Commissioners' denial of awards, and were reversed by the Fourth Circuit. In the fourth case (the title case in the court of appeals), the employee, also on the pier, had been injured while lifting a cable off the stern bollard of a vessel when it suddenly straightened, catapulting him into a river where he drowned. The Deputy Commissioner had found that the employee was covered under the Act, his award was affirmed by the district court and by the court of appeals, and it was not before the Supreme Court in *Nacirema.* Mr. Justice Douglas noted in his dissent that "[i]t is incongruous . . . that in an accident on a pier over navigable waters coverage of the Act depends on where the body falls after the accident has happened." 396 U.S. at 225.

The respondent employees, the International Longshoremen's Association (ILA), as *amicus curiae,* and the Solicitor of Labor (see note 5, *supra*) contend that the extension was much more substantial. Their position is that the process of unloading a vessel continues until the cargo is deposited on the consignee's truck on the pier (or begins, in the case of loading, when the goods are being removed from the delivery truck), and that anyone physically participating in this process is engaged in "maritime employment." We disagree with petitioners, without having to decide whether we would go to the full extent urged by their adversaries.

A.

We begin our analysis by remarking on the unsatisfactory state of the records before us, even if we include for this purpose the two petitions which we have dismissed. When cases of this nature began coming to the BRB shortly after the enactment of the Amendments, it should have realized that it was faced with a major task of statutory construction—in determining what constitutes "maritime employment" or being a "longshoreman or other person engaged in longshoring operations"—which task could be performed satisfactorily only in the light of an extensive factual background detailing the structure of work on the various piers of this country. The following are illustrative of facts we would like to know but on which these records shed little or no light, even as regards the port of New York, let alone the rest of the nation. Does one gang normally take cargo off or on the ship while another is responsible for transportation beyond the "point of rest?" Does the same gang always, sometimes, or often perform both jobs? Is all work on the pier normally

conducted by a single employer or is there a division between the stevedore and the "terminal operator"? Even if there is only one employer, does he segregate the employees in their work assignments, by having different collective bargaining agreements or otherwise? Are separate charges made for services beyond the "point of rest" and, if so, for what? Does the "point of rest" shift about on the same pier? Just what is the normal practice for stripping and stuffing containers with goods belonging to different owners or destined to different consignees? Is this work normally done on the pier or in warehouses not adjoining navigable waters? What determines the choices? Does the hazardous nature of the employment stop at the point of rest or continue so long as the cargo is on the pier? Do the hazards change in frequency or degree as the longshoreman moves away from the water? The consolidation of several cases presenting different factual situations in a single large proceeding might have enabled the BRB to make meaningful distinctions. Instead of developing such a record and laying down guidelines for the ALJ's, the BRB has handled each case on an individual basis,[12] and without establishing any record support for the interpretive rules announced therein.

If we were sitting as a court of last resort, we would remand these cases to the BRB on our own motion with directions to cause such a hearing to be held. But with the cases in their present posture in this circuit and others,

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[12] We were told at argument that in the *I.T.O.* case the NAS tendered to the BRB a "Brandeis brief" intended to give the BRB some of the general information we have mentioned, outlining the division of labor in 45 ports in the United States; that the tender was rejected on the objection of the Solicitor on behalf of the Director, OWCP; but that the document was discussed at oral argument in the Fourth Circuit and has been referred to in other decisions of the BRB. We have not had even that much assistance.

we think it more helpful for us to state our views on what is now before us.[13]

B.

Perhaps the most useful way to approach the issue is to begin by discussing certain arguments we have not found to be particularly helpful.

(1) *The "presumption" of coverage, 33 U.S.C. § 920.* The claimants, the Solicitor of Labor, and the ILA place great reliance on a provision in the LHWCA as originally adopted in 1927, 33 U.S.C. § 920, and still in effect, that four things shall be presumed in the absence of substantial evidence to the contrary. One of these is "[t]hat the claim comes within the provisions of this chapter." 33 U.S.C. § 920(a). They contend that if the meaning of the new coverage provision, 33 U.S.C. § 903, is in any way doubtful, this presumption requires the doubt to be resolved in favor of coverage. We do not think this was what Congress had in mind; the very fact that the presumption can be overcome by substantial contrary evidence indicates its inapplicability to an interpretive question of general import such as this. See *Crowell* v. *Benson,* 285 U.S. 22, 64-65 (1932).

Even in cases holding that the accordian-like phrase "arising out of and in the course of employment," 33 U.S.C. § 902(2), could be widely stretched, the Court has done little more than mention the presumption, *Cardillo* v. *Liberty Mutual Ins. Co.,* 330 U.S. 469, 474 (1947); *O'Keeffe* v. *Smith, Hinchman & Grylis Associates, Inc.,* 380 U.S.

[13] If one or more of the other circuits seized of this problem should order such a remand, we would entertain a petition for rehearing to enable us to do the same.

359, 361 (1965) (per curiam), resting its decision mainly on the principle with respect to the scope of review discussed below. In *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U.S. 504 (1951), the Court did not rely on the presumption at all, even in the face of a strong dissent. The Court's decisions dealing with questions of coverage of the sort presented here will be searched in vain for any mention of the presumption, see, e.g., *Parker* v. *Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Norton* v. *Warner Co.,* 321 U.S. 565 (1944); *Calbeck* v. *Travelers Ins. Co., supra,* 370 U.S. 114 (1962); *Nacirema Operating Co., Inc.* v. *Johnson, supra,* 396 U.S. 224 (1969),[14] although in *Norton* and *Nacirema* coverage was rejected. The cases in this court, *Michigan Mutual Liability Co.* v. *Arrien,* 344 F.2d 640, 645-46 (2 Cir.), *cert. denied,* 382 U.S. 835 (1965), and *Overseas African Construction Corp.* v. *McMullen,* 500 F.2d 1291, 1296 (2 Cir. 1974), likewise treat the presumption as merely an embodiment of the "rule . . . that so long as any reasonable inference from the facts supports jurisdiction under the statutory presumption that jurisdiction may be found." 500 F.2d at 1296. Here the question is not whether a line established by Congress is sufficiently elastic to include the claimant; the main issue is whether Congress placed the line at the "point of rest" or much further landward. Only if we have made the latter basic decision might the presumption come into play in ruling on cases near the border. See *Davis* v. *Department of Labor,* 317 U.S. 249 (1942).

[14] In *Davis* v. *Department of Labor,* 317 U.S. 249, 256 (1942), the Court noted that with respect to the largely "factual questions" relating to whether an employee injured within the "twilight zone" of federal jurisdiction established by the Court should be compensated under state or federal law, "presumptive weight" should be given to the findings of the federal or state administrator of the respective program, and relied in part on § 920(a).

(2) *"Deference" to the BRB.* We likewise see no merit in the contention of claimants and the Solicitor of Labor that we are confined in our decision because of the deference owed to the BRB. We agree that the standard of review we must apply is that factual findings of the BRB are conclusive if supported by substantial evidence in the record considered as a whole since, as held in *Potenza* v. *United Terminals, Inc.*, 524 F.2d 1136 (2 Cir. 1975), it is of no moment that 33 U.S.C. §921(b)(3) while applying this standard to the BRB's review of the ALJ's findings of fact does not expressly extend it to review in the court of appeals. But we are still confronted with the ever troubling question whether the determination at issue, namely, whether the 1972 Amendments should be so interpreted as to include these claimants, is the kind of question which justifies or requires judicial deference.

We think it is time to recognize, in line with Professor Kenneth Culp Davis' brilliant discussion, 4 Administrative Law Treatise §§ 30.01-09 and the corresponding sections in the 1970 Supplement, that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand.[15] Leading cases supporting the view that

[15] Our discussion of the Court's ambivalence with respect to deference is not to be read as dealing with two problems quite different from that here presented. One concerns an agency's exercise of power to formulate substantive rules, where the scope is wide, see, e.g., *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232 (1936); *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), and the rules once issued, even if only in the form of guidelines, are "entitled to great deference," *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 430-36 (1975). The other concerns an agency's construction of its own rules, see, e.g., *Bowles* v. *Seminole*

great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis are *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 146 (1939); *Gray* v. *Powell*, 314 U.S. 402, 411-12 (1941); and *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944). The rationale of these decisions was applied in the three "arising out of and in the course of employment" Supreme Court cases under the LHWC—*Cardillo, O'Leary* and *O'Keeffe*, cited above. Indeed, the Court seems to have rejected the findings of the LHWCA's Deputy Commissioners only once since the statute was enacted, *Norton* v. *Warner Co., supra*, 321 U.S. 565. However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term. Illustrative cases are *Office Employees International Union Local No. 11, AFL-CIO* v. *NLRB*, 353 U.S. 313 (1957), and *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 150 (1944). In one of its most recent decisions on the subject, *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974), the Court held that "In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose"; this very nearly eliminates the "deference" principle as regards statutory construction altogether since if the agency's determination is found by a court to be consistent with the congressional purpose, it presumably would be affirmed on that ground without any need for deference.

Rock & Sand Co., 325 U.S. 410, 413-14 (1945); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *TSC Industries, Inc.* v. *Northway, Inc.*, —— U.S. ——, —— n.10 (1976), 44 L.W. 4852, 4855 n.10 (1976).

There are several other reasons not to rest decision on the "deference" approach in these cases. One is that unlike the F.C.C. in the *Rochester Telephone* case, the Bituminous Coal Division of the Department of the Interior in *Gray* v. *Powell*, or the NLRB in the *Hearst* case, the BRB is not a policy making but entirely an umpiring agency. When Congress has charged an agency with the duty to make and implement a national policy, it is more likely that Congress intended the agency to have some flexibility, free from judicial intrusion, in interpreting the Congressional grant. Compare *Rochester Telephone Corp.* v. *United States, supra,* 307 U.S. at 146; *Permian Basin Area Rate Cases,* 390 U.S. 747, 767 (1968). A second factor is the way in which the agency has gone about its job. As suggested above, we would be much more inclined to defer to a considered judgment of the BRB rendered on a full record than to this series of short opinions on isolated facts which contain no in-depth study of the problem. A somewhat related point is that although the BRB's decisions have been "consistent and contemporaneous," the issue arose almost immediately after the 1972 Amendments became effective at a time when the BRB had little experience in the administration of the Act; yet its initial decisions, surely not the result of any great expertise, became the basis for all the others. "[A]n agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." *FMC* v. *Seatrain Lines, Inc.,* 411 U.S. 726, 745 (1973). Finally, this is a case where understanding of the statute depends in no small measure on prior judicial decisions and legislative history—subjects on which a court has a greater competence than the BRB. We therefore reject the argument that the BRB's

decisions in these cases must be affirmed if they are rational but wrong.

(3) *Other definitions.* We likewise give little weight to arguments made on both sides which are based on definitions of "longshoreman" or maritime employment or contracts formulated in different contexts and for different purposes. The ILA relies on Congress' approval, Act of Aug. 12, 1953, ch. 407, 67 Stat. 541, of definitions (reproduced in the margin)[16] in a compact between New York and New Jersey creating the bi-state Waterfront Commission. To assume that the 1972 Congress had in mind this action of its predecessor of 1953 is to attribute a degree of acumen few Congressmen would claim. Beyond

[16] See ILA Amicus brief at 5-6 n.1. The definitions in the Bi-State Compact can be found at § 9806 of McKinney's Unconsolidated New York Laws and § 32:23-6 of N.J.S.A.

"Pier" shall include any wharf, pier, dock or quay.

"Other waterfront terminal" shall include any warehouse, depot or other terminal (other than a pier) which is located within one thousand yards of any pier in the Port of New York district and which is used for waterborne freight in whole or substantial part.

"Longshoreman" shall mean a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal, either by a carrier of freight by water or by a stevedore

(a) physically to move waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, or

(b) to engage in direct and immediate checking of any such freight or of the custodial accounting therefor or in the recording or tabulation of the hours worked at piers or other waterfront terminals by natural persons employed by carriers of freight by water or stevedores . . . .

"Stevedore" shall mean a contractor (not including an employee) engaged for compensation pursuant to a contract or arrangement with a carrier of freight by water, in moving waterborne freight carried or consigned for carriage by such carrier on vessels of such carrier berthed at piers, on piers at which such vessels are berthed or at other waterfront terminals.

that, the purposes of the two enactments were quite different; it is for that reason that paragraph (b) of the Waterfront Commission Act includes persons, notably clerical workers, clearly not embraced under the most liberal construction of the 1972 Amendments.

On the other hand, a narrow definition of "longshoring operations" [17] formulated by the Secretary of Labor in 1960 as part of safety regulations issued in respect of "all employments covered by this chapter," 33 U.S.C. § 941(a), is likewise not dispositive of the meaning of the words used in the Amendments since under the old statute covered employment was limited to injuries occurring "upon the navigable waters of the United States (including [only] any drydock)." And despite the definition of "carriage of goods" as covering "the period from the time when the goods are loaded on to the time when they are discharged from the ship" contained in the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1301 (e), we have held that the contract of carriage, obviously a maritime contract, persists after unloading and that the carrier remains liable, not as a carrier but as a bailee, until it delivers the cargo to the consignee or places it in a public dock or warehouse. *David Crystal, Inc.* v. *Cunard Steamship Co.*, 339 F.2d 295, 298 (2 Cir. 1964), *cert. denied*, 380 U.S. 976 (1965); *Leather's Best, Inc.* v. *S.S. Mormaclynx*, 451 F.2d 800, 811-12 (2 Cir. 1971); *Cameco, Inc.* v. *S.S. American Legion Lines*, 514 F.2d 1291, 1295-96 (2 Cir. 1974).

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[17] • • • the loading, unloading, moving or handling of cargo, ships stores, gear, etc., into, in, on, or out of any vessel on the navigable waters of the United States.

25 Fed. Reg. 1566 (1960), 29 C.F.R. 9.3(i).

(4) *Liberal construction of remedial legislation.* There is more force in the contention of the claimants and the Solicitor that a broad reading of the 1972 Amendments is required by the oft-iterated principle that remedial legislation should be construed liberally. The Supreme Court said, as to this very statute, although in a quite different context, *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953):

> This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.

Petitioners do not altogether overcome this point by arguing that a statute must be construed with reference to the mischief intended to be overcome, see *Heydon's Case*, 3 Co. Rep. 7a, 76 Eng. Rep. 637 (1584), and that all that Congress intended to "remedy" was the unjust result of *Nacirema Operating Co.* v. *Johnson*, *supra*, 396 U.S. 212, by accepting the invitation which, pursuant to Mr. Justice White's suggestion, the unions extended to it.[18] The

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[18] The argument, in fact, flounders on a number of points. The invitation issued in *Nacirema* was broadly phrased:

> There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.

396 U.S. at 223-24. The Court contemplated at least two possibilities: an extension of the LHWCA to cover longshoremen injured

statutory language can fairly be read to do more than that and thus the liberality principle tends in favor of such a reading.

C.

With this background we address ourselves, at long last, to the words of the statute with the aid of the legislative history. There is no question that claimants met the situs test of § 903(a),[19] and concededly all worked for covered "employers" under the Act; the question is whether each—now Blundo and Caputo—was a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . . ." § 902(3).[20]

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on a pier "while loading or unloading a ship," or an extension to "coincide with the limits of admiralty jurisdiction." In the absence of clarifying legislative history, we would have no idea which set of evils referred to in *Nacirema* Congress was endeavoring to overcome.

[19] In the Blundo case the petitioner, I.T.O. makes a halfhearted argument that Blundo was not injured on the navigable waters within the expanded definition because the 19th Street pier on which he was injured was not used for the loading or unloading of vessels. This argument flies in the face of the statute, which reads " . . . including *any* adjoining pier . . . *or other adjoining area* customarily used by an employer in loading, unloading, repairing, or building a vessel." (Emphasis added.) It would seem that any pier next to the water is included within the situs definition. Accord, *I.T.O. Corp. of Baltimore* v. *Adkins, supra,* 529 F.2d at 1083-84. The testimony before the ALJ established that Blundo was injured at one of two "finger" piers which jutted into the water from the terminal. The entire terminal adjoined the water and was enclosed by a single gate. The finger pier at 21st Street was used for vessels; the finger pier at 19th Street was used to load and unload containers. Blundo was clearly on a "pier" and a "terminal" adjoining the water, a part of which was used for loading and unloading vessels. This is sufficient.

[20] Judge Craven, dissenting from the panel opinion in *I.T.O.*, advanced the argument, although he did not base his conclusion on

If there were any doubt on the face of the statute, the legislative history makes clear that § 902(3), as here relevant, is to be construed no differently than if it said "any longshoreman or other person engaged in longshoring activity or engaged in other maritime employment." Cf. *Argosy Limited* v. *Hennigan,* 404 F.2d 14, 20 (5 Cir. 1968); *United States* v. *Gertz,* 249 F.2d 662, 666 (9 Cir. 1957). The Senate Committee on Labor & Public Welfare stated, Sen. Rep. No. 92-1125, 92d Cong. 2d Sess., at 13:

> It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.
>
> The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstances of whether the injury occurred on land or over water.

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it, that this phrasing might make the inquiry too narrow, since § 902(3) also includes "any harborworker," 529 F.2d at 1090 n.3. He cited the statement in 1 *Norris, The Law of Maritime Personal Injuries* § 3 (3d ed. 1975), that the longshoreman is only "[f]irst in the catalogue of harbor workers." Arguably, however, Congress intended "harbor workers" to refer only to persons similar to those specifically described ("any harborworker including a ship repairman, shipbuilder, and shipbreaker") and not to persons concerned with the movement of cargo. But see *Norris, supra,* § 5. Like Judge Craven we find it unnecessary to decide the point.

> Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The House Committee Report, No. 92-1441, 92d Cong. 2d Sess. contained identical language.

Secondly, and more important, Congress perceived a need to provide expressly for coverage for "any longshoreman" in addition to what it had established for a person engaged in "longshoring operations." A "longshoreman" may thus be covered at some times even when he is not engaged in traditional longshoring activity. This alone is sufficient to condemn the "point of rest" doctrine. Petitioners concede that persons engaged in moving unloaded cargo to its first point of rest or moving cargo to be loaded from its last point of rest are engaged in "longshoring operations." If they alone were to be covered, there was no need to provide also for "any longshoreman."

What then did Congress mean by that phrase? Obviously it is not enough that a claimant calls himself a longshoreman or that a longshoreman's union in a particular port has forced employers to hire its members for such unlongshoreman-like positions as clerks or guards. But see *Weyerhaeuser* v. *Gilmore, supra,* 528 F.2d at 962.

The reports of the Senate and House committees go a long way toward supplying an answer. Immediately after the two paragraphs quoted above came the following:

> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break, bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees

work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

Two conclusions emerge from this with seeming certainty: One is that Congress was concerned about "the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels," new facts of life on the waterfront which, as this court noted in *Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n,* 426 F.2d 884, 886 (2 Cir. 1970), mean that a good deal more of the longshoreman's traditional jobs are now performed on shore. Stripping a container of goods destined to different consignees is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on shore and not in the ship's cargo holds. Congress intended to cover men engaged in these activities if they met the situs test contained in the Act—irrespective of the employee's position vis-à-vis a "point of rest." The committees said expressly that "checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment." Congress did not say they were covered only if they unloaded the container at the spot where a crane had first deposited the container or loaded it at a place on the water's edge; one of the advantages of containers is that they permit loading or unloading to be done at less congested locations. It sufficed for coverage if an accident arising from the stripping or stuffing of containers occurs at a place within the situs test. One answer to petitioners' argument that stuffing or stripping a container on a pier

is no different from doing the same job a mile away is that Congress may have doubted its power, under the admiralty clause of Article III, to go further than it did. This would decide Blundo's case if he had been "checking" the container at the pier where it was first deposited even if it had been moved several times. We fail to perceive any significant difference because, for the convenience of someone, it had been moved to another pier. The cargo had not yet been delivered to the consignee; the unloading process still had not been completed.[21]

The second conclusion is that Congress was concerned with providing uniformity of coverage for persons engaged in the loading or unloading functions on the piers. It wished to minimize the occasions when longshoremen and other harbor workers would be walking from the liberalized benefits of LHWCA to the much lower ones provided by state compensation laws.[22] Petitioners argue

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[21] As many admiralty cases have decided, in construing other doctrines of maritime law, a realistic view of the loading or unloading process recognizes that it does not stop as soon as the cargo first hits the pier on being removed from a vessel, nor does it begin only when the cargo stands on the pier next to the vessel on which it is about to be loaded. See *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202, 214 at n.14 (1971), *rev'g on other grounds, Law* v. *Victory Carriers, Inc.,* 432 F.2d 376 (5 Cir. 1970). Frequently large gangs of longshoremen, dozens of men, are assigned different tasks in a continuous process which moves cargo off a vessel ultimately to a warehouse or storage area at the far end of the pier or terminal. *Garrett* v. *Gutzeit,* 491 F.2d 228 (4 Cir. 1974).

[22] Joseph Leonard, Safety Director of the ILA, in speaking to the House Committee about the former coverage provisions, asked, "What do we do, cut ourselves in half?" Hearings on H.R. 247, H.H. 3505, H.R. 12006, and H.R. 15023 (Longshoremen's & Harbor Worker's Compensation Act Amendments of 1972), before the Select Subcomm. on Labor of the House Comm. on Educ. & Labor, 92d Cong., 2d Sess., 297.

that Congress was concerned with providing uniformity only in the *Nacirema* situation, where the same employee engaged in the same unloading or loading operation would have been protected by the federal statute if a draft of cargo hit him while he was on the ship but not if his injury occurred on the pier itself, and point to the fact that the illustration used by the committees was a case where cargo is "unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters." But the committees stated their intention more broadly—"to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." The concern for uniformity was not limited to rectifying the disparity between the longshoreman making up the draft on the ship and the longshoreman receiving it on the pier; it extended to the disparity that would result if a line were drawn between the latter and a longshoreman, perhaps the very same one, who moved the unloaded cargo to another place on the pier.[23] The committees' language clearly is broad enough to cover a person like Caputo who spent a significant part of his time in working on vessels, so long as he did not come within the category mentioned as being excluded—employees who are not engaged in loading or unloading a vessel, "[t]hus, employees whose responsibility is only to pick up stored cargo for further trans-shipment."

Petitioner asserts that Caputo came within both descriptions of excluded persons. Clearly he did not come

[23] Congress also expressed interest in extending federal coverage to as many longshoremen as possible to avoid the "disparity in benefits payable . . . for the same type of injury depending on . . . in which State the accident occurs." Senate Committee Report, *supra*, at 12.

within the second. His responsibility was to perform a variety of jobs on the pier, on both sides of the "point of rest," including going on vessels. Also we would not regard the cargo as "stored" within the committees' meaning simply because the consignee had delayed five days in picking it up.[24] The question whether he was engaged in loading or unloading (here unloading) is closer. If his injury had occurred while he was moving the boxes of cheese from a previous position on the pier to the consignee's trucks, he clearly would have been engaged in "unloading," in the way that term is used in ordinary speech. That being so, it would be wholly artificial to draw a distinction because his injury occurred while he was inside the consignee's truck. See note 21, *supra*. To be sure, the carrier would probably have fulfilled its legal duty if it had instructed the stevedores simply to place cargo alongside consignees' trucks and leave the loading of the trucks to them. But, so far as we can gather from this meagre record, that is not the life of the waterfront. The driver needs help in loading or unloading his truck, it would be uneconomical for him to carry a sufficient supply of helpers, everyone wants the truck off the pier as soon as possible, so the stevedores have their employees lend a hand. It is not clear whether an additional charge is collected for this, but we do not think it matters. Neither do we think it matters that the stevedore might not be liable for mishandling by a longshoreman within the truck.

[24] We thus are not required to decide whether cargo should ever be regarded as "stored" so long as it remains on the pier in the custody of the stevedore employed by the vessel rather than being placed in a public warehouse. Dellaventura's case, where there was a delay of 133 days, might have demanded such a decision.

Petitioners make a significant argument that the high benefits under the Amendments were provided because of the extremely hazardous nature of longshoring and that these extraordinary hazards no longer exist once the cargo is beyond the "point of rest." Indeed, in Caputo's case the parties stipulated that what Caputo was doing was the same, and entailed the same risk of injury, as exists wherever and by whomsoever trucks are loaded or unloaded with dollies. The Senate Report, p. 2, refers to "high-risk occupations such as those covered by this Act" and says that "[l]ongshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations." What we do not know is what types of operations were considered to be longshoring for the purpose of these calculations. Also, as shown by the case of Blundo, who slipped on ice while he was checking the contents of a container that was being stripped on a pier other than the one where the vessel was unloaded, unusual hazards can exist due to the exposure of piers to the elements which would not exist in a manufacturing plant or in a garage or warehouse where containers removed from trucks were being stripped. Doubtless the hazards of longshoring vary with the particular tasks being performed, and may in some instances be no greater than those encountered by persons doing similar work in places other than piers or terminals adjoining the water's edge.[25] However all this may be, we find nothing in the words of the statute or its legislative

[25] But see the statement of Representative Hicks of Massachusetts on the floor of the House. 118 Cong. Rec. 36387 (Oct. 14, 1972). And see House Hearings, *supra* note 22, at 288-89 (statement of Patrick Tobin, Internat'l Longshoremen's and Warehousemen's Union (ILWU)).

history that would enable us to construct a "hazard" test; Congress' intention was rather to provide uniformity of coverage for workers injured while engaged in the process of loading or unloading ships who met the situs test. We note in this connection that the increased benefits inure to shipbuilders meeting the situs test, although much of their work is performed in facilities no more hazardous than those not within the expanded definition of "navigable waters" and that the benefit schedules of LHWCA apply to all industrial accidents in the District of Columbia, Act of May 17, 1928, ch. 612, 45 Stat. 600 (1928), 36 D.C. Code § 501 (1973).

In a variation of the argument last considered, petitioners contend that because of the higher benefits payable under LHWCA than under state compensation acts, construing the Amendments to apply beyond the point of rest will increase the already high expense of stevedores to an extent that Congress could not have intended. Clearly, as explained at the outset, the act was a trade-off—a gain to the stevedores in doing away with the *Sieracki-Ryan* triangle, a gain to the workers in higher benefits and in moving the *Jensen* line shoreward. Just how much added cost Congress meant to impose on stevedores by the second part of the bargain is impossible to determine.[26] What is clear is that Congress had a profound distaste for a regime in

[26] It is worth noting that the increased benefits provided by the Amendments followed recommendations of the National Commission on State Workmen's Compensation Laws (Sen. Rep., p. 4), and that Congress may well have expected that enactment of the Amendments would have an effect on state compensation laws. Hearings on S. 2318, S. 525, and S. 1547 (Longshoremen's & Harbor Worker's Compensation Act Amendments of 1972) before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 92d Cong., 2d Sess., at 74 (statement of James O'Brien, Ass't Dir. Soc'l Sec. Dep't, AFL-CIO), 149 (statement of Joseph Leonard, Safety Director, ILA).

which employees engaged in the rough and tumble work described in the Amendments should be covered under the Federal Act at one moment and under state acts at another.

We therefore hold that the Amendments at least cover all persons meeting the situs requirements (1) who are engaged in stripping or stuffing containers or (2) are engaged in the handling of cargo up to the point where the consignee has actually begun its movement from the pier (or in the case of loading, from the time when the consignee has stopped his vehicle at the pier), provided in the latter instances that the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel. That is as far as we need to go to affirm Blundo's and Caputo's awards; whether the proviso is essential can be left for another day. The facts of these cases likewise do not require us to formulate a rule for the situation wherein the goods have been deposited in a public warehouse by the stevedore in unloading or the shipper in loading.

Petitioners say, as indicated above, that in effect our construction reads the status requirement out of the Act. We concede it goes some way in that direction. But it does not do so completely; we part company with Gilmore & Black when they assert that the committee reports should be disregarded and the Amendments then "can fairly be read to cover all employment-related injuries which occur within the Act's territorial limits." The Law of Admiralty, § 6.51 at 430 (1975).[27] We believe our position avoids some

[27] They add that "a female secretary who works in a terminal warehouse should qualify as a LHCA harbor worker in exactly the same way that a female hairdresser in a cruise ship's beauty salon qualifies as a Jones Act seaman." *Id.* We do not find the analogy persuasive. Cruise ships encounter rough weather and may even sink; terminal warehouses don't. Cf. *Mahrams* v. *American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2 Cir. 1973).

of the more problematic possibilities lurking in the new "status" requirement, and accords with the liberal interpretation which must be given this remedial statute and its remedial amendments. See Comment, Broadened Coverage Under the LHWCA, 33 La. L. Rev. 683, 693 (1973).

VI. *Constitutionality*

In so construing the Amendments we have necessarily assumed that the construction would be constitutional. We think that assumption is well founded.

It is beyond dispute that "Although containing no express grant of legislative power over the substantive law, the provision [for Article III as to admiralty and maritime jurisdiction] was regarded from the beginning as implicitly investing such power in the United States." *Panama R.R. Co.* v. *Johnson*, 264 U.S. 375, 386 (1924). The classic definition of the jurisdiction was Mr. Justice Story's in *DeLovio* v. *Boit*, 7 Fed. Cas. 418, 444, Case No. 3776 (C.C.D. Mass. 1815), that it "comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea." Mr. Justice Story used the broad term "locality" in his definition of the jurisdiction with respect to "torts, and injuries." Although the Supreme Court later defined locality as including only injuries suffered on navigable waters and not injuries on the land caused by a vessel, *The Plymouth*, 70 U.S. (3 Wall.) 20 (1866), the Court has acquiesced in Congress' overruling that holding by the Admiralty Extension Act, 46 U.S.C. § 740, which was applied without question in *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963). See also

United States v. *Matson Navigation Co.*, 201 F.2d 610 (9 Cir. 1953), cited with approval in *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 209 n.9 (1971), in which the Court stated that "if denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Arts. I and III of the Constitution to enact a suitable solution." *Id.* at 216.[28] Most important of all are the statements in *Nacirema, supra*, 396 U.S. at 223, that "There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship," and the suggestion that Congress be invited to do something about this, *id.* at 397. The Court would scarcely have suggested this if it had entertained doubt as to the constitutionality of a Congressional response.

We thus see no reason to question the power of Congress to expand the concept of a maritime tort to include injuries suffered by persons on structures adjoining navigable waters in the course of employment related to ships. If we were more doubtful on the point than we are, we would see no reason why the extension of coverage could not be predicated on the portion of the jurisdiction relating to maritime contracts, where there is no "locality" test. Contracts of employment relating to maritime matters are within that jurisdiction, *Sheppard* v. *Taylor*, 30 U.S. (5 Pet.) 675 (1831), and claims under LHWCA are by an employee engaged in "maritime employment" against an employer.

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[28] The Court has also sustained the Jones Act, which accords to seamen a remedy for injuries on land as well as on the sea, as an extension of the remedy of maintenance and cure. *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 40-41 (1943). If *Sieracki* retains any vitality, the constitutionality of the extension of coverage by the Amendments could be supported on this theory.

The petition to review in Dellaventura's case is dismissed as untimely and the petition in Scaffidi's case is dismissed on the ground that there no longer is a justiciable controversy between the employer and the employee. The petitions in Blundo's and Caputo's cases are denied on the merits.

LUMBARD, *Circuit Judge* (concurring and dissenting):

I agree that Pittston's petition seeking review of the award in Scaffidi's case should be dismissed as there is no justiciable controversy by reason of the insurance carrier's payment of the award. I also agree that Pittston's petition to review Dellaventura's case should be dismissed as untimely filed.

With respect to the denial of the petitions in the *Blundo* and *Caputo* cases, I respectfully dissent. As the relevant considerations have been so ably and extensively set forth here by Judge Friendly and also by Judge Winter in *I.T.O. of Baltimore* v. *Benefits Review Board, U.S. Dep't of Labor and Adkins*, 529 F.2d 1080 (4th Cir. 1975), no purpose would be served in any further protracted discussion. I agree with Judge Winter that "[t]he 1972 extension of coverage was intended only to remove inequities and anomalies arising when a person otherwise engaged in 'maritime employment' was injured on land," 529 F.2d at 10881, and with his additional statement that " . . . with respect to longshoremen or other persons engaged in longshoring operations, the Amendments extend only to those employees engaged in loading and unloading activities between the ship and the first (last) point of rest, including checkers 'directly involved in [such] loading or unloading functions,'" 529 F.2d at 1088.

It is more in keeping with the realities of maritime employment to draw the line at the first point of rest in discharging the cargo and at the last point of rest in loading a vessel. Moreover, such a rule is far easier to apply and avoids claims such as that put forward by Dellaventura that he is entitled to compensation for his injury while loading a consignee's truck with coffee bags which had been stored in a warehouse for 133 days after being removed from the ship CAMPECHE. This being so, it seems to me that the interpretation adopted by the Fourth Circuit is more consistent with what the Congress intended and with the language of the 1972 amendment.

Blundo, a checker employed by I.T.O., was injured while checking cargo being removed from a container. The container was located on a stringpiece of the 19th Street pier in Brooklyn, had been unloaded a few days before at a different pier and had been trucked through the streets to the 19th Street pier to be opened there by United States Customs before the container was stripped. What Blundo did was done well after the container had been left at the first point of rest.

Caputo's principal duties related to terminal labor. When injured he was working at the Northeast Marine Terminal on the Brooklyn waterfront inside the truck of a consignee, while helping the consignee's truck driver load boxes of cheese which had been discharged from a vessel at least five days before. Thus in Caputo's case his activity occurred after the boxes of cheese had come to rest on the pier.

For these reasons I would grant the petition and set aside the awards in the cases of Blundo and Caputo.

APPENDIX B

Decision of Benefits Review Board

U. S. DEPARTMENT OF LABOR

BENEFITS REVIEW BOARD

Washington, D.C. 20210

BRB No. 75-161

(Entered November 17, 1975)

RALPH CAPUTO

Claimant-Respondent

v.

NORTHEAST MARINE TERMINAL CO., INC.

and

STATE INSURANCE FUND

Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party in Interest

Appeal from Decision and Order of Thomas F. Howder, Administrative Law Judge, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Hartman, Member:

This is an appeal by the employer and the carrier (hereinafter, the employer) from a Decision and Order (75-LHCA-

20) of Administrative Law Judge Thomas F. Howder awarding compensation benefits to the claimant. The petitioners allege that the Decision and Order is contrary to law. The claim was filed pursuant to provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended. 33 U.S.C. §901 *et seq.* (hereinafter referred to as the Act).

The Claimant was employed by Northeast Marine Terminal Company as "terminal labor". On the date of the injury the claimant was loading a consignee's truck with cases of cheese discharged from a vessel five days earlier. These cases were being lifted into the back of the truck by a forklift and the claimant was moving them further into the truck on a dolly when he slipped and injured his foot.

The only issue before the administrative law judge was whether this claimant was a covered employee under the Act. Citing *Avvento* and other BRB decisions in that line, the administrative law judge concluded that the claimant was covered under the Act and ordered that compensation benefits be paid. *Avvento* v. *Hellenic Lines, Ltd.*, 1 BRBS 174, BRB No. 74-153 (November 12, 1974).

In *Avvento* the employee was also injured inside of a consignee's truck. He was performing the same kind of task as was the claimant in the instant case. Inasmuch as these cases are factually identical, all that the Board stated in *Avvento* pertain here and need not be repeated.

The petitioners urge that the Board reached the wrong conclusion in *Avvento*. It is their position that we should treat the date of tender of delivery rather than actual delivery as the point where goods leave the sphere of maritime jurisdiction. Their point here is that the consignee was

dilatory in picking-up the cargo, that a reasonable opportunity to pick-up cargo in the Port of New York is 5 days (also known as "free time") and that as the consignee unduly delayed picking-up the cargo, admiralty jurisdiction no longer obtains. The Board takes no position on this point as it relates to the cargo; "free time" and the consignee's delay in picking-up the goods have no effect on the character of work required to deliver the cargo to the consignee. It is the work done by the longshoremen, the actual loading and unloading, with which we are concerned. The work performed by the claimant here is the same whether performed the day the cargo arrives in port or weeks later. A mere delay in time does not alter the maritime nature of work required. *Avvento* v. *Hellenic Lines, Ltd., supra.*

Finally, petitioners urge that:

> [t]he amendments were not meant to cover any worker, or injury to any worker, whose job involves no risk of injury greater than those which prevail wherever and by whomsoever goods are handled on a dolly inside a truck.

This Board has repeatedly held that the amendments have in fact extended coverage inland to include all those areas specified in Section 3(a) of the Act. 33 U.S.C.§903(a); *Avvento, supra. Adkins* v. *I.T.O. Corporation of Baltimore*, 1 BRBS 199, BRB No. 74-123 (November 29, 1974). The injury in this case occurred in a terminal, an area specifically defined to be within the jurisdiction of the Act. 3 U.S.C. §903()a. The jurisdictional requirements of Sections 2(3), (4) also having been satisfied, it is clear that the provisions of the Act obtain. 33 U.S.C. §902(3), (4).

Claimant's attorney, having submitted a request for a fee pursuant to 20 C.F.R. §702.132 for work performed in defense of this appeal, is granted a fee of $600.

The Decision and Order of the administrative law judge is in all respects affirmed.

/s/ Ralph M. Hartman, Member

/s/ Ruth V. Washington, Chairperson

/s/ Julius Miller, Member

Dated this 17th day
of Ñovember, 1975.

APPENDIX C

Decision and Order of Administrative Law Judge

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Washington, D.C. 20210

Case No. 75-LHCA-20

(Entered April 29, 1975)

In the Matter of

RALPH CAPUTO,

Claimant,

v.

NORTHEAST MARINE TERMINAL CO.,

Employer,

STATE INSURANCE FUND,

Carrier,
Respondents.

Before: THOMAS F. HOWDER
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim arising under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.* (hereinafter "Act") and the Rules and Regulations implementing the Act, 20 C.F.R. Parts 701 and 702.

A hearing in this case was held before me in New York, New York, on October 23, 1974. The claimant and respondents were represented by counsel at the hearing, and were afforded full opportunity to be heard, to adduce evidence, to call, examine and cross-examine witnesses and to file briefs. A brief in this matter was also filed on behalf of the Director, Office of Workers' Compensation Programs.

Upon the entire record in this case, and from my observation of the sole witness and his demeanor, I make the following findings, conclusions and Order:

Findings and Conclusions

Counsel for claimant and respondents stipulated that claimant, Ralph Caputo, on April 16, 1973, suffered an injury to his left foot in the course of his employment, resulting in a 15% permanent partial disability. The accident occurred in a truck being loaded on a terminal in Brooklyn leased by the employer, Northeast Marine Terminal Co., from the City of New York. The cargo involved, apparently cases of cheese, had been discharged from a vessel at least five days previously, and had been stored on the terminal's premises awaiting the arrival of the consignee. When, on April 16, the consignee's truck arrived for pick-up, it was claimant's work assignment to assist in the loading thereof. A fork lift vehicle was used to lift the cargo onto a dolly inside the truck. Claimant was injured when, while walking backwards with the rolling dolly, he tripped over a backstop on the floor of the truck, catching his left foot under the dolly.

It was further stipulated that claimant did not return to work following the accident until May 7, 1973; that claimant was temporarily totally disabled during this period;

that his average weekly wage was $305.20; that timely notice of the accident was given; that the claim was timely filed; and that claimant has been paid compensation under the workmen's compensation statute of the State of New York in the amount of $266.

The only issue in this case is whether claimant's injury falls within the coverage of the amended Act.

As of this writing the Benefits Review Board has handed down several decisions respecting the issue of coverage under the 1972 amendments to the Act: See *Gilmore* v. *Weyerhauser Co.*, BRB No. 74-141 (Nov. 12, 1974); *Avvento* v. *Hellenic Lines,* BRB No. 74-153 (Nov. 12, 1974); *Adkins* v. *I.T.O. Corp.*, BRB 74-123 (Nov. 29, 1974); *Coppolino* v. *International Terminal Operating Co.*, BRB No. 74-136 (Dec. 2, 1974); *Brown* v. *Maritime Terminals,* BRB Nos. 74-177 and 177A (December 6, 1974); *Herron* v. *Brady-Hamilton Stevedore Co.*, BRB No. 74-171 (Jan. 23, 1975); *Perdue* v. *Jacksonville Shipyards, Inc.*, BRB No. 74-200 (Jan. 31, 1975); *Harris* v. *Maritime Terminals, Inc.*, BRB No. 74-178 (Feb. 3, 1975); *Kelley* v. *Handcor, Inc.*, BRB Nos. 74-165 and 74-165A (Feb. 23, 1975); *Mason* v. *Old Dominion Stevedoring Corp.*, BRB Nos. 74-182 and 74-182A (Mar. 21, 1975); and *Ford* v. *P. C. Pfeiffer Co.*, BRB Nos. 74-191 and 74-191A (March 21, 1975). These decisions are dispositive of the instant matter, at least at the administrative law judge level, as will be indicated.

Under the statute, and under the rationale of the above decisions, claimant, in order to obtain compensation benefits under the amended Act, must have been injured in a geographical location specified by Section 3(a), and must, at the time of the injury, have been engaged in maritime employment as defined in Section 2(3), working for an employer, as defined in Section 2(4).

Claimant was injured in a truck parked within the terminal area, the nearest water being over 400 feet distant (See Respondents' Exhibit 1). In view of the above decisions, and in view of the express language of the statute, including its express reference to "terminal", it is clear that the instant claim falls within the purview of the amended Act from the standpoint of situs.

There likewise appears to be no question that the "employer" requirements under Section 2(4) have been met. Thus the only question is whether claimant was injured in the course of maritime employment.

As pointed out in the briefs of the claimant and the Department, the controlling BRB decision in this case is *Avvento, supra.* There, as here, the claimant was injured in the process of transferring goods onto a truck—goods which had been unloaded from a vessel a few days previously and stored on the premises of the terminal while awaiting consignee pick-up.

Respondents' attempt to distinguish Avvento by pointing to a stipulation between counsel that the work claimant was doing when injured was the same work with the same risk factor as would obtain wherever and by whomever trucks were loaded or unloaded with a dolly. However, in view of the situs where the injury actually occurred, and of the Board's clear rulings on this point, I cannot accept the distinction.

On the basis of the foregoing findings and conclusions, I issue the following:

ORDER

1. Respondents shall pay to claimant compensation for temporary total disability, pursuant to Section 8(b) of the Act, for the period April 17, 1973 through May 6, 1973,

at the rate of 66-2/3% of claimant's average weekly wage of $305.20 (not to exceed the statutory maximum), less any amounts paid to claimant for this purpose under the workmen's compensation statute of the State of New York.

2. Respondents are liable for the reasonable medical expenses of claimant incurred because of his injury, and shall pay any which may be due and payable, as provided in Section 7 of the Act.

3. Respondents shall pay to claimant compensation for permanent partial scheduled disability for 15% loss of use of his left foot, as set forth in Section 8(c) of the Act.

4. Interest on accrued payments to claimant shall be paid at the rate of 6% per annum, computed from the date each payment was originally due.

5. A fee for legal services rendered to claimant pursuant to Section 28 of the Act, is approved in favor of Angelo C. Gucciardo, Esq., in the amount of $1573.65, which shall be paid to him directly by respondents.

/s/ THOMAS F. HOWDER
Administrative Law Judge

Dated: April 29, 1975
Washington, D.C.

APPENDIX D

Judgment of Court of Appeals

(Entered July 1, 1976)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of July, one thousand nine hundred and seventy-six.

Present:

HON. J. EDWARD LUMBARD
HON. HENRY J. FRIENDLY
HON. JAMES L. OAKES

Circuit Judges.

75-4043 75-4249
76-4009 76-4042

PITTSTON STEVEDORING CORPORATION,

Petitioner,

v.

JOHN SCAFFIDI,

Respondent.

In the Matter of the Claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act made by CARMELO BLUNDO,

Claimant-Appellee,

v.

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,

Self-Insured Employer-Appellant,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

NORTHEAST MARINE TERMINAL COMPANY, INC., and STATE INSURANCE FUND,

Petitioners,

v.

RALPH CAPUTO, and DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

PITTSTON STEVEDORING CORPORATION and THE HOME INSURANCE COMPANY,

Petitioners,

v.

ANTHONY DELLAVENTURA, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondents.

Petitions for review of orders of the Benefits Review Board of the Department of Labor.

This cause came on to be heard on the administrative record of the Benefits Review Board and was argued by counsel.

Upon consideration thereof, it is now hereby ordered, adjudged and decreed that said petitions be and they hereby are dismissed in part and denied in part in accordance with the opinion of this court with costs to be taxed against the petitioners.

A. Daniel Fusaro,
Clerk

By Vincent A. Carlin
Chief Deputy Clerk

APPENDIX E

Order of Court of Appeals Denying Rehearing

(Entered September 3, 1976)

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of September, one thousand nine hundred and seventy-six.

Present:

Hon. Edward J. Lumbard,
Hon. Henry J. Friendly,
Hon. James L. Oakes,
Circuit Judges.

Docket No. 76-4009

Ralph Caputo,
Claimant,

—and—

Director, Office of Workers' Compensation Programs,
United States Department of Labor,
Respondents,

v.

Northeast Marine Terminal Company, Inc.,
Employer

—and—

State Insurance Fund, Carrier,
Petitioners.

A petition for a rehearing having been filed herein by counsel for the petitioners,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

Supreme Court, U. S.
FILED
NOV 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-444

NORTHEAST MARINE TERMINAL COMPANY, INC.
and STATE INSURANCE FUND,

Petitioners,

—against—

RALPH CAPUTO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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88

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-444

NORTHEAST MARINE TERMINAL COMPANY, INC.
and STATE INSURANCE FUND,

Petitioners,

—against—

RALPH CAPUTO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In footnote 5 on page 3 of their petition for certiorari, petitioners undertook to file this supplemental brief for the sole purpose of citing reported decisions referred to in the petition which were then unreported, and appending copies of any decisions therein referred to which are still unreported.

The opinion below is not yet officially reported, but is unofficially reported in 1976 A.M.C. 881 and is printed in appendix A to the petition.

The opinion in *Sea-Land Services, Inc.* v. *Johns,* referred to on pages 3, 5, and 7 of the petition, is reported *sub nom. Sea-Land Services, Inc.* v. *Director, Office of Workers' Compensation Programs,* in 540 F. 2d 629.

The *in banc* opinion in *I.T.O. Corp. of Baltimore* v. *Adkins,* referred to on pages 4 and 7 of the petition, is not yet reported and is printed in appendix F to this brief.

The opinion in *Stockman* v. *John T. Clark & Son of Boston, Inc.,* referred to on pages 5, 7, and 8 of the petition, is reported in 539 F. 2d 264. On October 22, 1976, petition for certiorari was filed in that case (U.S. No. 76-571).

On October 4, 1976, the Court denied the petition for certiorari in *Gilmore* v. *Weyerhaeuser Co.* (U.S. No. 75-1620), referred to on pages 5 and 7 of the petition.

On September 27, 1976, a single opinion was rendered in *P. C. Pfeiffer Co., Inc.* v. *Ford* and *Ayers Steamship Co.* v. *Bryant,* referred to on page 5 of the petition, and the opinion is reported in 539 F. 2d 533. On November 8, 1976, a single petition for certiorari was filed in both cases (U.S. No. 76-641).

On September 28, 1976, petition for certiorari was filed in *Blundo* v. *International Terminal Operating Co., Inc.* (U.S. No. 76-454), referred to on page 8 of the petition.

A single petition for certiorari is expected to be filed during the week of November 22, 1976 in *Maritime Terminals, Inc.* v. *Brown* and *Maritime Terminals, Inc.* v. *Harris,* referred to on page 8 of the petition.

Respectfully submitted,

PETER M. PRYOR
WILLIAM M. KIMBALL
Counsel for Petitioners

New York, N.Y.
November 16, 1976

APPENDIX

Appendix F

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-1051

I.T.O. CORPORATION OF BALTIMORE, Employer,
and
LIBERTY MUTUAL INSURANCE COMPANY, Carrier,
Petitioners,

—v.—

BENEFITS REVIEW BOARD, U. S. DEPARTMENT OF LABOR,
Respondent,

WILLIAM T. ADKINS,
Respondent,

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
Amicus Curiae.

No. 75-1075

MARITIME TERMINALS, INC. and
AETNA CASUALTY AND SURETY CO.,
Petitioners,

—v.—

SECRETARY OF LABOR, and DONALD D. BROWN,
Respondents.

No. 75-1196

MARITIME TERMINALS, INC. and
AETNA CASUALTY AND SURETY CO.,
Petitioners,

—v.—

VERNIE LEE HARRIS, and UNITED STATES
DEPARTMENT OF LABOR,
Respondents.

No. 75-1088

NATIONAL ASSOCIATION OF STEVEDORES, *et al.*,
Petitioners,

v.

BENEFITS REVIEW BOARD, U. S. DEPT. OF LABOR,
Respondent,

WILLIAM T. ADKINS,
Respondent.

ON REHEARING IN BANC.

ARGUED May 4, 1976 DECIDED Aug. 26, 1976

Before:

HAYNSWORTH, *Chief Judge*, WINTER, CRAVEN, BUTZNER,
RUSSELL and WIDENER, IN BANC.

WINTER, *Circuit Judge:*

These consolidated appeals present two major questions: (1) the extent of coverage of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (sometimes "LHWCA"), to persons engaged in the necessary steps in the overall process of loading and unloading a vessel but who, prior to the Amendments, could claim benefits for accidental injury or death, sustained in the process, only under state law; and (2) whether, in a petition for review under 33 U.S.C. § 921(c), the Director, Office of Workers' Compensation Programs, Department of Labor, is a proper respondent. The appeals were first heard and decided by a divided panel of the court. I.T.O. Corp. v. Benefits Review Bd., 529 F. 2d 1080 (4 Cir. 1975). Chief Judge Haynsworth and I, comprising the majority, held that during the loading and unloading process the coverage of the Act extended to the first (last) point of rest. As applied to the facts, this holding resulted in the conclusion that none of the three claimants was entitled to benefits. Judge Craven was of a contrary view. He would have held that the three claimants were engaged in maritime employment on navigable waters of the United States, as defined in the Act, and hence they should be entitled to benefits under the Act for their accidental injuries. The panel was unanimous in deciding that the Director was not a proper respondent, although it was recognized that, in a proper case, he might be permitted to become an intervenor.

Because of the importance and novelty of the questions decided, the entire court granted cross-petitions for rehearing and reheard the appeals in banc. At the time the appeals were reargued, the in banc court consisted of six judges.

I.

On the issue of the extent of the Act's coverage, Chief Judge Haynsworth, Judge Russell and I subscribe to the views expressed in the majority panel decision. Judge Widener subscribes to the principle expressed in that opinion, although he defines the exact point between coverage and non-coverage somewhat differently.

In his application of the principle, Judge Widener concludes that the claimant Adkins is not covered by the Act, but that claimants Brown and Harris are covered. He reasons that the test of coverage is whether an otherwise eligible employee is injured while engaged in loading or unloading a ship; coverage would not extend to activities for transshipment of goods removed from a ship or goods destined for a ship. In Adkins' case, a container was removed from the ship and stored in the marshaling area. From there the container was moved to a shed where it was stripped and the contents were stored. Adkins was injured when he was moving the contents from the storage area onto a waiting delivery truck. The cargo was no longer being unloaded from the ship but was in the process of being loaded into a delivery truck. Adkins, in Judge Widener's view, was thus not covered because he was not participating in the unloading process; he was handling the goods for transshipment. Accordingly, Judge Widener concurs in the judgment of Chief Judge Haynsworth, Judge Russell and me to reverse Adkins' award.

In Brown's case, the cargo was brought from somewhere inland and deposited in a warehouse. Brown, operating a forklift, picked up cargo and stuffed it into a container. While stuffing the container, Brown was injured. When the stuffing would have been completed, a hustler would

have carried the container to the marshaling area, and from there the container would have been taken to the pier to be loaded on board. Thus, in Judge Widener's view, Brown was engaged in the overall process of loading the ship. The cargo was not merely being moved to storage for convenience or facility; the cargo was in the process of being loaded on board ship, and Brown was engaged in the loading process. Accordingly, Judge Widener concurs in the judgment of Judge Craven and Judge Butzner to sustain the award made to Brown.

Harris was a hustler who was injured while he was taking a container, stuffed with goods which had been stored after inland delivery, from the stuffing area to the marshaling area. From the marshaling area, the container would have been taken to the pier where it would have been loaded on board. The goods were being moved solely for loading purposes, not for mere convenience, and therefore, in Judge Widener's view, Harris, like Brown, was engaged in the overall process of loading the ship. Accordingly, Judge Widener concurs in the judgment of Judge Craven and Judge Butzner to sustain the award made to Harris.

Judge Craven and Judge Butzner subscribe to the views expressed by Judge Craven in his dissenting panel opinion, and for those reasons and the additional reasons expressed by Judge Butzner in his separate opinion attached hereto, they vote to affirm the awards made to Adkins, Brown and Harris.

By the majority votes of Chief Judge Haynsworth, Judge Russell, Judge Widener and me, the award to Adkins (Nos. 75-1051 and 75-1088) is reversed. By an equally divided court, the awards to Brown and Harris (Nos. 75-1075 and 75-1196) are affirmed.

II.

On the issue of whether the director is a proper respondent, an issue raised only in Nos. 75-1051 and 75-1088, Chief Judge Haynsworth, Judge Russell, Judge Widener and I subscribe to the views expressed in the majority panel decision as hereafter amplified. Judge Craven and Judge Butzner subscribe to the views expressed in Judge Butzner's separate opinion attached hereto.

III.

Chief Judge Haynsworth, Judge Russell, Judge Widener and I amplify our conclusion that the Director is not a proper respondent as follows:

Prior to the 1972 Amendments, the Act provided for judicial review by an injunction suit against the deputy commissioner making a compensation award. The pertinent part of 33 U.S.C. § 921(b) (1970), *as amended*, 33 U.S.C. § 921(c) (1976 Supp.), provided:

> If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in . . . the judicial district in which the injury occurred. . . .

One of the 1972 Amendments revised § 921 so that subsection (c), the counterpart of the previous subsection (b), now provides:

> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the circuit

> in which the injury occurred, by filing in such court . . . a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted . . . to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings. . . .

Certainly the deputy director was a party to pre-1972 litigation, but neither he nor his counterparts is expressly designated as a party by the 1972 Amendments. The legislative history is unenlightening as to the reason for this omission. While it is true that old § 921a[1] provided that the United States Attorney would represent the Secretary or the Deputy Commissioner in any court proceedings under old § 921, and that § 921a was continued by the 1972 Amendments although modified to permit the Secretary to appoint his own counsel,[2] the legislative history is again unenlightening. To conclude from the mere existence of new § 921a that the Secretary, or his designee, the Director, is automatically a party to a review proceeding is to beg the question. This section's existence can as well mean only that

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[1] 33 U.S.C. § 921a, *as amended*, 33 U.S.C. § 921a (1976 Supp.):

> In any court proceedings under section 921 of this title or other provisions of this chapter, it shall be the duty of the United States Attorney in the judicial district in which the case is pending to appear as attorney or counsel on behalf of the Secretary of Labor or his deputy commissioner when either is a party to the case or interested, and to represent such Secretary or deputy in any court in which such case may be carried on appeal.

[2] 33 U.S.C. § 921a (1976 Supp.):

> Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

if otherwise made a party, *e.g.*, by intervention in a review proceeding, the Secretary or Director will be represented by attorneys appointed by him.

Indeed, § 939(c) (1), added by the 1972 Amendments, suggests the latter reading. It provides that "[t]he Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim." It would be a redundancy for the Secretary to be authorized to provide legal services to a prevailing claimant if the Secretary himself was intended actively to litigate to sustain an award.[3] Thus, unlike the pre-1972 Act and numerous other laws providing for judicial review or orders of administrative agencies,[4] the LHWCA, as amended in 1972,

[3] We fail to understand how the Director's statutory duty to provide legal assistance to claimants confers upon him a stake in the proceedings independent of that of any claimant, as apparently urged by the dissent. The issue we confront is not whether the Director may appear before us as Adkins' representative, but whether the Director may participate in his own behalf.

We also note that we find nothing in the statute or its legislative history to indicate that the availability of legal assistance to claimants may be made to turn upon whether the Director agrees or disagrees with the decision which a claimant seeks to appeal, as the dissent appears to suggest, *infra*, slip opinion at 20 (*"If he deems the decision erroneous,* his statutory duty to assist the claimant includes seeking review.").

[4] Most other statutes providing for judicial review of agency action are simply not analogous to the LHWCA because under them true adversity exists between the claimant of a *government* benefit and the government agency which seeks to withhold it. Thus, when review of agency action is sought by an unsuccessful applicant for a license before the FCC, *see* 47 U.S.C. § 402, or an unsuccessful applicant for a rate increase before the FPC, *see* 16 U.S.C. § 825l (b), or an unsuccessful claimant for Supplemental Security Income before the Secretary of H.E.W., *see* 42 U.S.C. §§ 405(b), 1383(c) (3), it is clear that the agency must be named a respondent since *it* is the party against whom relief is sought; the court could not grant an effective remedy without its presence. (Conversely, these agencies would never have reason to seek review of their own decisions.) In LHWCA cases, on the other hand, it is

does not on its face make the Director a respondent to a petition to review under § 921(c).

Since the Act is not specific, it follows that, if the Director is to be a party, he must be a "person adversely affected or aggrieved by a final order of the Board" within the meaning of § 921(c). Whether he is or is not is a question closely akin to the issue of whether the "case or controversy" requirement of Article III of the Constitution has been met.

Generally, to be adversely affected or aggrieved under the statute or to present a case or controversy under the Constitution, one must have suffered "injury in fact, economic or otherwise." *See* K. Davis, Administrative Law

the private employer or insurance carrier which will have to pay any award which may be entered.

The Labor-Management Relations Act is more nearly similar to the LHWCA, since under it, as under the LHWCA, disputes are adjudicated between antagonistic private parties. And the NLRB may be called upon to defend its decisions in court. *See* 29 U.S.C. § 160(f). However, the NLRB's status as a party in the courts of appeals derives from its enforcement powers. *See id.* ("Upon the filing of such petition [for review], the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section [granting the Board power to enforce its decisions in court], and shall have the same jurisdiction . . . to make and enter a decree enforcing, modifying . . . or setting aside in whole or in part the order of the Board"). Thus, like the FCC, the FPC, the Secretary of H.E.W. and other agencies, the NLRB is an adverse party in court because adjudication is being sought of *its* right to grant relief in behalf of the prevailing party before it. The Director, Office of Workmen's Compensation Programs has no enforcement powers comparable to those of the NLRB.

Moreover, it is not the decision of the *Director* which is called into question by a petition for review under 33 U.S.C. § 921(c), but that of the Benefits Review Board. Thus, the Director does not possess even a concrete interest in defending his *own* decision in court, as does, for example, a district judge against whom a writ of mandamus is sought. As we noted in the majority panel opinion, the Benefits Review Board has specifically asked that it *not* be denominated a party respondent in these proceedings. To that request, we acceded.

(1970 Supp.) § 22.00-1 at 706; 3 *id.* § 22.02. Therefore, to be a party before this court, the Director must have some concrete stake in the outcome of the case.

The Director asserts he has the requisite stake because

> [h]e is directly affected in his official capacity by the correctness of the Board's decision involving the proper scope of coverage of the Act with whose administration he is charged as the designee of the Secretary of Labor.

The Secretary of Labor's administrative duties, delegated to the Director, *see* 20 C.F.R. § 701.202, are set out in 33 U.S.C. § 939. Subsection (e) (1) is most arguably relevant to the Director's stake in the Board's decisions:

> The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation and including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.

But we do not think that these duties provide the requisite stake. They do not confer upon the Director any specific interest in the proper administration of the Act.

In United States ex rel. Chapman v. F.P.C., 191 F.2d 796, 799-800 (4 Cir. 1951), *rev'd*, 345 U.S. 153 (1953), we held that the Secretary of the Interior lacked standing to challenge an order granting a license to a private company

to construct a dam. The Secretary claimed to be affected by the order because it was his statutory duty to market surplus electrical power from publicly constructed dams. The Supreme Court reversed without opinion on this point, upholding standing. 345 U.S. at 156. *See* 3 K. Davis, supra, § 22.15 at 280.

The Director asserts that *Chapman* supports his position before us, but we disagree. The Secretary of the Interior in *Chapman did* have some stake in the outcome: it would have been harder for him to market public power if another private dam was built. Alternatively, if the private project was disapproved, it would have been more likely that a public dam would eventually have been built, in which case the Secretary would have had more power to market. Thus, regardless of whether the Secretary was faced with a surplus or a shortage of electrical power to market under his statutory authority, the FPC's decision would directly affect him in the performance of his marketing obligations. The Director in this case has no such specific interest. Therefore, we read *Chapman* to suggest that the Director does not have a stake in the outcome and cannot be a party.

The lack of a stake in the outcome on the part of the Director would appear to end our inquiry. The Director argues, however, that because he is a party to proceedings before the Board, 20 C.F.R. § 801.2(10), it would be anomalous if he were not a party before this court. There are several answers to this argument. First, of course, that the Director is a party to proceedings before the Board does not alter the fact that he has no direct stake in the outcome of the case, is not a person aggrieved by Board action and is thus without a case or controversy to assert. Second, the

fact that one is permitted to be a party to administrative proceedings does not require that one be entitled to initiate judicial review of those proceedings:[5] in the former case, the participant may perform a useful role by calling to the administrative agency's attention considerations it could not on its own initiative, much in the way that an intervenor would in this court; in the latter situation, however, the hopeful party is seeking to initiate a new level of proceedings because of dissatisfaction with the result below. *See* 3 K. Davis, supra, § 22.08 at 242.

Finally, it would appear even from the regulations implementing the Act that the Director is not *automatically* to be a party in this court, even though he is automatically a party before the Board. In 20 C.F.R. § 801.2(10), "party" is defined as follows "the Secretary or his designee *and* any person or business entity aggrieved or directly affected by the decision or order from which an appeal to the Board is taken." (Emphasis added.) However, 20 C.F.R. § 802.410 provides: "any *party* adversely affected or aggrieved by such decision [of the Board] may take ar appeal to the U. S.

[5] While the Director here seeks to be named a *respondent* to a petition for review, a holding that he is a "person aggrieved" whose presence insures proper adversity would necessarily lead to the conclusion that he is entitled to petition for review of a decision of the Benefits Review Board of which he disapproves: if the Director has an interest in sustaining a Board decision with which he agrees, then he also has an interest in overturning a decision with which he disagrees. We would not readily subject the LHWCA to a construction under which the official charged with administering the Act could invoke the aid of the federal courts to reverse the decision of the board responsible for adjudicating claims under the Act. The unfairness of such a result is manifest if one contemplates the possibility that in some future case the Director, in furtherance of his asserted interest in determining "the proper scope of coverage of the Act," might seek to reverse an award to a claimant on the ground that the Board had been too generous.

Court of Appeals . . . ." (Emphasis added.) Thus, the Secretary is a "party" before the Board even if he is not "aggrieved"; but to be entitled to participate in court proceedings, the Secretary, although a "party" below, must, like any other "party," be adversely affected.

In summary, we stand firm in our conclusion that the Director is not automatically a respondent in a review proceeding under § 921(c).

In our earlier opinion, we added that we did not decide that "a court of appeals may not, in a proper case, permit intervention by others [including the Director] who have an interest at stake . . . ." We elaborate on that comment: The Director unquestionably has a right to seek to intervene under Rule 24(b), Fed. R. Civ. P.,[6] and an application will ordinarily be granted. See 3B J. Moore, Federal Practice ¶ 24.10[5]; 7A C. Wright & A. Miller, Federal Practice and Procedure § 1912. The Director has not, however, sought intervention in these cases. We assume that he has not done so because he does not wish to render moot his assertion that such a request on his part is unnecessary. Having decided that such a request is necessary, we will still consider such a request on his part should he be advised to make it.

Nos. 75-1051 and 75-1088—REVERSED.

Nos. 75-1075 and 75-1196—AFFIRMED.
Each Party to Pay His Own Costs.

[6] The Federal Rules of Civil Procedure principally govern procedure in the United States district courts in suits of a civil nature, Rule 1, but Rule 81(c) makes them applicable also to review proceedings under the Act to the extent that the Act does not prescribe procedure.

BUTZNER, *Circuit Judge, dissenting*:

I

I believe that the Director, Office of Workmen's Compensation Programs, should be recognized as a party to these proceedings. This issue raises a simple question of statutory construction. In 33 U.S.C. § 939(c), Congress authorized the Secretary of Labor to assist claimants and to provide them legal assistance. This statute must be read along with 33 U.S.C. § 921(a), which provides that attorneys appointed by the Secretary shall represent him before the courts of appeals. The Secretary has properly delegated his responsibilities to the Director.

Regulations under the Act establish the Director as a party before the Benefits Review Board. 20 C.F.R. § 801.3 (10). His stake in the proceedings arises out of the duty imposed by 33 U.S.C. § 939(c)(1) to assist claimants. Thus, the Director, like any other party before the Board, is aggrieved within the meaning of 33 U.S.C. § 921(c) by an adverse decision of the Board. If he deems the decision erroneous, his statutory duty to assist the claimant includes seeking review. If the decision favors the claimant, the statute authorizes the Director to support the award on review.

In sum, the Act expressly places on the Secretary or his designee, the Director—not upon the courts of appeals—the responsibility of determining when the Director should participate in the review of the Board's orders. Congress did not condition the Director's appearance in our court on our granting or withholding permission.

The difference between the Director's status as a permissive intervenor and as a party is more than a technical

nicety. The majority rule, as I see it, will create roadblocks to filing petitions for review and certiorari, and it will provoke extended litigation over whether the Director's position in a given case satisfies the requirements of Rule 24(b). Other circuits have wisely recognized the Director's status as a party. *See e.g.*, Pittston Stevedoring Corp. v. Dellaventura, No. 76-4042 (2d Cir. March 16, 1976); McCord v. Cephas, No. 74-1948 (D.C. Cir. March 25, 1975). I am not persuaded that we should differ from their sound conclusions.

II

I fully agree with Judge Craven that the point of rest theory espoused by the majority of the court is a judicial gloss on the 1972 Amendments of the Longshoremen's and Harbor Workers' Compensation Act, which is warranted by neither the Act nor its legislative history. *See* I.T.O. Corp. v. Benefits Review Board, 529 F.2d 1080, 1089 (4th Cir. 1975) (Craven, J., dissenting). I add only these brief observations. A careful study of the majority opinion filed when this case was heard by a panel, *I.T.O. Corp.*, 529 F.2d at 1081, discloses that the effect of the point of rest theory is to deprive longshoremen of coverage under the Act when they are injured while stuffing or stripping a ship's containers at a marine terminal. The slight modification of the theory in the majority's per curiam opinion alleviates some, but not all, of its harsh results. It does so, however, at the expense of adding the factor of lapse of time to the vague concept of place for determining the point of rest. Rational, uniform application of the court's theory to the myriad circumstances in which injuries occur will be most difficult.

Judge Craven initially voted with the majority to deny the Director standing as a party to these proceedings. On en banc reconsideration, he is now persuaded otherwise, and concurs in Judge Butzner's opinion.

Supreme Court, U. S.
FILED
JAN 21 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-444

NORTHEAST MARINE TERMINAL COMPANY, INC. AND STATE INSURANCE FUND,
Petitioners,

v.

RALPH CAPUTO

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Respondents.

No. 76-454

INTERNATIONAL TERMINAL OPERATING CO., INC.
Petitioner,

v.

CARMELO BLUNDO

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED SEPTEMBER 24, 1976 AND SEPTEMBER 28, 1976, CERTIORARI GRANTED DECEMBER 6, 1976

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APPENDIX A

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges

Case No. 75-LHCA-20

In the Matter of the Claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act

RALPH CAPUTO,
Claimant

against

NORTHEAST MARINE TERMINAL CO.,
Employer

STATE INSURANCE FUND,
Carrier.

Room 208,
26 Federal Plaza,
New York, New York.

Wednesday, October 23, 1974.

The hearing in the above-entitled matter was convened at 10:18 a.m., before THOMAS F. HOWDER, Administrative Law Judges, presiding.

APPEARANCES:

On behalf of the Claimant:

ANGELO C. GUCCIARDO, ESQ., Israel, Adler, Ronca & Gucciardo, 160 Broadway, New York, New York 10038.

On behalf of the Employer/Carrier:

WILLIAM M. KIMBALL, ESQ., 25 Broadway, New York, New York 10004.

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[3] PROCEEDINGS

JUDGE HOWDER: This is a hearing in the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, in the case of Ralph Caputo versus Northeast Marine Terminal Company, with State Insurance Fund being the insurance carrier.

This is Case No. 75-LHCA-20, formerly Case No. 2-30240.

I am Thomas F. Howder, the Administrative Law Judge.

I would like to ask counsel to identify themselves for the record.

MR. GUCCIARDO: Angelo C. Gucciardo, of the firm of Israel, Adler, Ronca & Gucciardo, 160 Broadway, New York, New York 10038. Telephone number: 212-227-1350.

JUDGE HOWDER: Counsel for respondent?

MR. KIMBALL: William M. Kimball, 25 Broadway, New York, New York 10004.

JUDGE HOWDER: This hearing is being held pursuant to notice issued August 20th, 1974. Counsel are advised that any papers, documents or exhibits previously submitted to or filed with the Deputy Commissioner are not a part of the record at this point.

I would like to inquire of counsel whether they have been able to come to any agreement respecting any of [4] the matters in this proceeding?

MR. KIMBALL: We have, and we would like to state our stipulations on the record at some appropriate time.

JUDGE HOWDER: Yes, I would like to hear those now. Which counsel would like to recite those stipulations?

MR. KIMBALL: It makes no difference. I can go ahead and recite them right here.

JUDGE HOWDER: Is that agreeable with you, Mr. Gucciardo?

MR. GUCCIARDO: Yes, it is, and if it is something that I believe not to be correct, I will voice my objection immediately, Your Honor.

MR. KIMBALL: Quite appropriate.

We have stipulated, not necessarily in any significant order, the following, subject to any possible correction or modification by Mr. Gucciardo:

That this claimant's average weekly wage was $305.20; that timely notice of the accident was given; that the claimant was injured in this accident within the course of his employment; that the employer is insured for coverage under the Longshoremen's and Harbor Workers' Compensation Act.

The accident date was April 16, 1973. The claimant was temporarily totally disabled from the accident date through May 6, 1973.

MR. GUCCIARDO: And in the event that you find in [5] favor of the claimant, the award should run from April 17, 1973, to May the 6th, 1973, inclusive.

MR. KIMBALL: Agreed. That the claimant returned to work on May 7th, 1973; that the employer has paid $266 compensation under the New York State Workmen's Compensation Act for the entire period of temporary total disability.

JUDGE HOWDER: What is that amount again?

MR. KIMBALL: $266 for which amount the employer is entitled to be credited in the event these proceedings are determined adversely to the employer.

It is agreed that the claimant will be examined for possible schedule loss within the next two, three weeks, following which examinations there will either be an agreement as to the amount of the schedule or the reports of the respective physicians will be submitted for a determination of the amount of the schedule in the event the parties cannot agree.

The possibility of failure to agree, I think is quite unlikely, would you think that, Mr. Gucciardo?

MR. GUCCIARDO: That is so, and it is further stipulated that Mr. Goldstein and myself will undertake these negotiations and advise you directly.

MR. KIMBALL: That is preferred by me.

JUDGE HOWDER: Within two to three weeks.

MR. GUCCIARDO: Yes, sir.

[6] MR. KIMBALL: It is agreed that what I inaccurately call a chart, which is more appropriately a map, is to be received as Respondent's Exhibit 1—I will ask that it be marked in a moment—and it is agreed that Respondent's Exhibit 1 is accurate, it is to scale, and it shows by markings on the upper lefthand corner, the approximate place where the accident occurred.

At the time of the accident, the claimant was employed by Northeast Marine Terminal Company, Inc. He was employed on that date in a category which is called extra labor/freight handler. He was loading cargo inside the truck of a consignee. The truck was located within the terminal area, as shown on this map, Respondent's Exhibit 1. The terminal area was leased by Northeast Marine Terminal Company, Inc., the employer, from the City of New York.

The cargo which the claimant was loading in the truck at the time of the accident had been discharged from a Yugoslav ship, the ALEXANDER, five days prior to the accident date, and during the five days, of course, had been stored on the terminal.

At this time I would like to ask that the map be received as Respondent's Exhibit 1.

JUDGE HOWDER: Is there any objection to that, Mr. Gucciardo?

MR. GUCCIARDO: No. I concur in the stipulations [7] as recited by counsel, and perhaps if you will permit us an additional whisper, we may be able to stipulate to one more thing.

JUDGE HOWDER: All right, let us mark it Respondent's Exhibit 1, and it will be received in evidence.

[The map referred to was marked Respondent's Exhibit No. 1 and received in evidence.]

[Discussion off the record.]

JUDGE HOWDER: Counsel for respondent has informed me that he has no problem with the issue of the claim being timely filed.

Before you begin, I would like to know precisely what was the injury?

MR. GUCCIARDO: The injury was, I believe, to the back and the left foot. It is primarily a left foot injury that we are concerned with.

There is no claim, really, to the back. The claimant says it was very minor. But there was a fracture in the great toe and in the general area of the forefoot.

JUDGE HOWDER: You may proceed.

MR. KIMBALL: That is not stipulated to, of course. We think the injury was to the left great toe. That is what our file indicates, but this will all be resolved within the next two or three weeks, hopefully, to your satisfaction.

[8] JUDGE HOWDER: Thank you.

MR. GUCCIARDO: We would like to stipulate further, Your Honor, that at this particular terminal area, which is commonly known as 39th Street, that the only cargo handled there is cargo received from various shippers throughout the country and destined for another port, or cargo unloaded from vessels and then destined for various consignees who have imported the merchandise either from this country, a local port, or a foreign port.

All of the cargo handled either is going on board a vessel or has come from a vessel.

MR. KIMBALL: As best I understand it, that is also stipulated.

JUDGE HOWDER: The 39th Street is here in Manhattan?

MR. GUCCIARDO: It is in Brooklyn, Your Honor, and the body of water is the Gowanus Bay, which is a navigable water. I think counsel will stipulate to it.

MR. KIMBALL: No question about it.

JUDGE HOWDER: Do either of you have anything more to say at this point?

MR. GUCCIARDO: No, Your Honor.

JUDGE HOWDER: Counsel for the claimant, how would you like to proceed?

MR. GUCCIARDO: I would like the claimant to testify, and even though some of the questions I may ask have [9] been stipulated, if counsel will permit me, just so we get the continuity of the record.

Mr. Caputo.

Thereupon,

RALPH CAPUTO,

the claimant, was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GUCCIARDO:

Q Mr. Caputo, will you please give your name and address for the record?

A My name is Ralph Joseph Caputo. I live at 66 Grant Street, Staten Island, Zip Code 10301.

Q Mr. Caputo, what is your occupation?

A My occupation is a longshoreman.

MR. KIMBALL: I object to the characterization, unless it is a loose one rather than a legal one.

I suppose that is what we are here to decide, whether he is or is not a longshoreman.

JUDGE HOWDER: I agree with that, and I will let him describe his activities as being a longshoreman, in that it does not determine the legal issue.

BY MR. GUCCIARDO:

Q Mr. Caputo, as a longshoreman, where do you do your work?

[10] A Mostly in the hold of a ship, where I am naturally put at work.

Q Are you also—do you also do terminal work?

A Terminal labor work, dock work.

Q When you work on a ship, where do you work?

A Down in the hold of the ship.

Q What do you do there?

A Unload and load pallets, we do the same with nets—

Q You load and unload a vessel from the dock?

A Yes.

Q As terminal laborer, would you describe what your duties are?

A Terminal laborer consists of the job of loading trucks, discharging, loading containers, also lighters and barges.

Sometimes, if it is necessary, they put you on the ship, which consists of ship labor, if they need you.

Q Well, when you are used as ship laborer, what do you mean by that?

A Ship laborer consists of loading for the crew and laundry.

Q Is that commonly known as ship stores?

A Yes.

Q You said as terminal laborer you worked on lighters [11] and barges. Are you using the same words interchangeably? Does it mean the same to you?

A A lighter is a closed one, and a barge is an open one.

Q As terminal laborer, what do you have to do with these barges and lighters?

A Sometimes we have to discharge them and sometimes you have to load them.

Q When you discharge them or load them, are they afloat adjacent to the dock area?

A They are on the water, and they are tied to the string piece.

Q And whether you are working as a terminal laborer or working on the hold of a ship or loading ship stores, or doing lighter work, what is that all called, as far as you are concerned?

A It consists of work as a longshoreman.

Q Are you a member of a union?

A Yes, sir.

Q What union?

A Local 1814.

Q What is the union called? Is it the International Longshoremen's Association?

A Yes.

Q And are all of the workers, whether they be hold [12] workers, terminal laborers, checkers, or lighter workers—

A They all belong to that local.

Q All belong to the—

A 1814.

Q —the Longshoremen's Union, regardless of what local?

A Yes.

Q How long have you been so employed, did you say, for the record?

A I have been a longshoreman since 1947.

Q And since 1947—are you still employed as a longshoreman?

A That is right.

Q From 1947 up to the present time, the activity that you have just described, that is working as terminal laborer, working on lighters and working in the hold of a vessel, is that essentially what you do?

A That is it.

Q Do you do this work for various stevedoring companies?

A Stevedoring companies.

Q Is this essentially what is known as a Shape job?

A It is considered a Shape job when there is no job at your regular pier.

Q Well, does a Shape job mean that you go to a hiring [13] hall and you are hired out wherever work is available throughout New York-New Jersey area?

A We have one at 16th Street in Brooklyn.

Q Are you a regular member of a gang?

A I am a regular member of a gang. The gang number is 801.

Q Where do you work normally?

A Normally on the dock.

Q What company?

A If it is necessary for me to go down in the hold at times, if there are men down in the hold, we are compelled to go down. Because we are never allowed to let men work shore—

JUDGE HOWDER: Which company do you work for?

THE WITNESS: Pittston Stevedoring.

BY MR. GUCCIARDO:

Q Now, is a gang that unit of workmen commonly used to load and unload a vessel?

A There is supposed to be eight men down in the hold.

Q Just answer the question. Does the gang load or unload the vessel?

A Right.

MR. KIMBALL: I want the record to reflect I thought we stipulated to obviate some testimony, and I was hoping that Mr. Gucciardo would get into something that I [14] at least would consider relevant.

I don't think it makes any difference what this fellow does most of the time of his life, even if this were the only day in his whole life that he had done what he was doing at the time of the accident. That is the only thing material before this court.

In other words, he could be a longshoreman working on ships 364 days a year, but if you are injured on the 365th day while repairing watches in the center of Manhattan, the question of whether he was entitled to benefit under the Longshoremen Act would be: What was he doing at the time of the accident? Not what had he done 364 other days of the year.

So I believe that all of the testimony thus far elicited is totally irrelevant to the issue which is presented before this tribunal.

JUDGE HOWDER: I understand your point.

However, I am going to let Mr. Gucciardo develop his general duties. I have your point well in mind, believe me.

How old are you?

THE WITNESS: Fifty-seven.

BY MR. GUCCIARDO:

Q Does the gang load or unload the vessel?

A Yes, sir.

[15] Q And as such, are some men in the hold, some men on the dock, and some men on the string piece of the dock—I meant deck before when I said dock.

A Yes.

Q You are normally what—

MR. KIMBALL: We are going to have testimony which I consider totally irrelevant, unless it is going in one judicial ear and out the other. It threatens to prejudice my client.

Therefore, I respectfully ask that it at least be elicited by non-leading questions.

So I object to the form of the questions being used to elicit what I consider to be prejudicial, irrelevant testimony.

MR. GUCCIARDO: May I be permitted to answer that point?

JUDGE HOWDER: Yes, you may.

MR. GUCCIARDO: We are not bound by the strict rules of evidence here, and the Act specifically refers to longshoremen.

I have a right to develop the record as to what longshoremen do all over the terminal, as well as the ships on which they work.

Counsel is here for the specific reason of taking this case completely up on appeal to the highest court, if [16] necessary. And under the circumstances, since we are all well aware of what is going to happen to this case, I respectfully submit to Your Honor that you allow the widest latitude in developing the record.

JUDGE HOWDER: In these judicial cases, and I have heard several of them, none in New York necessarily, I like to have a broad record.

I like both counsel to have an opportunity to develop their cases in the record to the extent that they think is material. I realize that some of these cases are on appeal, and that is why I told Mr. Kimball at this point I will let you develop whatever you consider—

MR. KIMBALL: In so far as there may be a credibility issue and I have just been handed a piece of paper which causes me to believe that perhaps there may, Your Honor is disadvantaged in determining credibility if all of the testimony comes in the questions.

Mr. Gucciardo is no doubt an expert in these matters, but you want to know presumably what this witness is going to testify to.

JUDGE HOWDER: I think you have a valid point.

I have noticed the questions have been leading, and so let us stay away from those. This is an administra-

tive hearing, and I do give some latitude there, but I think Mr. Kimball's point is valid. I wish you would stay [17] away from that.

MR. GUCCIARDO: I will, Your Honor, although we both know what the duties of a longshoreman are. We could almost stipulate for the record.

I'm sure I would accept his determination of what a gang worker does or does not do.

MR. KIMBALL: Do you want to accept my stipulation that checkers do not belong to 1814 of the ILA?

MR. GUCCIARDO: I will accept that stipulation, except they do belong to the Longshoremen's Union under a different number. Checkers have their own local.

JUDGE HOWDER: Well, let us not testify.

I would like to get out for the record what this witness's duties are, and let us be careful of the form of the questions.

MR. GUCCIARDO: Okay, I will, Your Honor.

BY MR. GUCCIARDO:

Q What specifically do you do on the dock as a member of the gang?

A If it is a loading of the ship, we hook up the pallets and send them down to the hold of the ship. When they come out empty, we have to unload them. In the discharge of a ship, sometimes we discharge cargo by pallets, which consist of two extra men on the dock going down below the cargo. But if it goes in by—if it comes [18] out by nets, we will have to have six men on the dock, sometimes you have eight men, and we use hooks to take the cargo from the net and we palletize the cargo in the pallets.

Q And by what mechanism is this pallet taken on the vessel or discharged from the vessel, as the case may be?

A As soon as we—you see, the cargo comes out of various—

Q Let me interrupt you, Mr. Caputo. By what mechanism is the pallet taken from the dock and put on the ship, and vice versa?

A By the boom of the ship, the ship's cable.

Q Ship's equipment?

A Yes.

Q Now, when there is no work for you in your regular gang, how do you obtain work?

A I obtain work by going up to the hiring center at Sixth Street and Third Avenue in Brooklyn.

Q Who maintains this hiring center?

A It is run by the Waterfront Commission.

Q Are all of the men who work on the waterfront required to go to this hiring hall in order to be hired?

A Just longshoremen and carpenters at the hiring center.

Q When you say carpenters—

A That is right.

[19] Q What do carpenters do in relation to vessels?

A As far as lashing cargo on the ship.

Q The cargo that you load in the ship?

A In the ship.

Q Who hires you in the hiring hall?

A Hired agent. [sic]

Q Who does the hiring agent work for?

A The hiring agent works for the various stevedores.

Q Now, on April the 16th, 1973, did you go to the hiring hall in order to obtain work?

A To get a day's work.

Q Who hired you?

A The hiring agent, by the name of Tommy Costa.

Q C-o-s-t-a?

A C-o-s-t-a.

Q Now, what did he specifically hire you for on that particular day?

A He hired me as a terminal labor man.

Q Now, when there is no work for you on board a vessel, can you go work in another dock—at another dock and work on board a vessel?

A You can.

Q And who—let us assume for the moment that you are going to work at 39th Street, where you were injured on board a vessel, who would hire you there?

[20] A The same hiring agent, by the name of Tommy Costa.

Q Are you aware of the fact that there are two operating companies at 39th Street in Brooklyn?

A Yes.

MR. KIMBALL: Object to the form of the question.

MR. GUCCIARDO: Withdrawn.

BY MR. GUCCIARDO:

Q How many companies have you worked for at 39th Street in Brooklyn?

A Two companies.

Q What's the names?

A Northeast Marine Company and Northeast Stevedore Company.

MR. GUCCIARDO: Will counsel stipulate that it is Northeast Marine Terminal Company and Northeast Stevedoring Company?

MR. KIMBALL: I will stipulate to the date by Northeast Marine.

MR. GUCCIARDO: Northeast Marine Stevedoring Company as the other company?

MR. KIMBALL: I do not know anything with respect to the other company by this man.

JUDGE HOWDER: What was that name again?

THE WITNESS: Northeast Marine and the other one is Northeast Stevedoring Company.

[21] JUDGE HOWDER: Is that correct?

MR. GUCCIARDO: Stevedoring Company, Inc.

JUDGE HOWDER: Let the record reflect that fact.

THE WITNESS: If you work on the ship, you get paid by one; if you work for terminal labor, you get paid by another one.

BY MR. GUCCIARDO:

Q Now, as far as the personnel in charge of Northeast Marine Terminal and Northeast Stevedoring Company, Inc., is there any difference?

A No, they are the same.

MR. KIMBALL: Objection, the witness could not possibly know the answer to that question.

JUDGE HOWDER: Let us see if he does.

THE WITNESS: They are the same.

BY MR. GUCCIARDO:

Q Is the president the same of Northeast as he is for Northeast Stevedoring, as well as Northeast Marine?

MR. KIMBALL: Objection. You might as well ask him to do logarithms in his head.

MR. GUCCIARDO: Either he knows or he doesn't know.

There is no need for an objection for every single question along these lines.

MR. KIMBALL: Can we ask if he knows who the [22] president is, or if he had talks with him?

JUDGE HOWDER: I don't know, either.

I will let him say of his own knowledge. If he doesn't know, he doesn't know. It is as simple as that.

MR. KIMBALL: I respectfully submit that to ask him without some foundation question is to call for his opinion or conclusion, most probably rehearsed with him by counsel.

So we are not getting what he knows. We are getting what he is being told to testify to, unless we have some foundation questions.

MR. GUCCIARDO: Object to counsel indicating in the record what I spoke with my client about and move that it be stricken from the record.

JUDGE HOWDER: We won't strike it, but disregard it.

Now, I would like to inquire of Mr. Kimball, these questions to me seem relatively innocuous. I don't know the foundation of your objection.

Why do you object to this line?

MR. KIMBALL: I submit they are irrelevant to these proceedings, first off. But apparently the questioning attorney thinks they have some relevancy and accordingly I am bound by your decision to treat them with some seriousness.

If you wish to advise me in advance that you are going to give them no weight at all, why, I suppose we can [23] let him elicit almost anything he wants to by leading questions, seeking opinion testimony.

JUDGE HOWDER: My policy is to develop a broad record in jurisdictional cases and then after it is all in, I assign it appropriate weight to matters at hand there. That is the way I will approach this line of questioning.

MR. KIMBALL: Apparently counsel is seeking to establish for some purpose that the president of two companies, which have different functions at a facility inaccurately called 39th Street Terminal, have the same president. I say, so what?

JUDGE HOWDER: I may "so what" too—

MR. KIMBALL: How—

JUDGE HOWDER: Don't interrupt me.

MR. KIMBALL: I didn't intentionally interrupt you.

I had not completed my own thoughts on the matter. If you wish to put a thought in now, it is your absolute right to do so. But I will not intentionally interrupt the court, nor be in any manner be rude to the court; but I will, to the extent permitted, attempt to articulate my thinking for the benefit of my client to the 100 percent best of my abilities.

That is my sole function here.

JUDGE HOWDER: All right. I understand that.

[24] Mr. Gucciardo?

MR. GUCCIARDO: I have a request to make.

In view of the articulation of counsel, that he either object and specifically state his objection, and not go into long dissertations as to the reasoning and get in by inference in his own statements, which don't belong in the record.

JUDGE HOWDER: All right, let us abandon this quibbling and just proceed.

You ask your questions, and I understand you have serious objections to them.

MR. KIMBALL: I do, sir.

JUDGE HOWDER: And I certainly will entertain them and assign them the appropriate weight.

Mr. Gucciardo, please proceed.

MR. GUCCIARDO: Yes, and if you will entertain a motion at this time.

I move at this time that the minutes in the case of Gasper Scalmato vs. Northeast Marine Terminal, Case No. 74-LHCA-203, specifically referring to a witness produced under subpoena of the State Insurance Fund, a Mr. Chertoff, C-h-e-r-t-o-f-f, relating to terminal labor and relating to the officers and employees of both Northeast Marine Terminal and Northeast Stevedoring Company, Incorporated, be made a part of this record.

[25] MR. KIMBALL: I oppose the application.

MR. GUCCIARDO: That was a case of Scalmato which was recently decided by Judge Miller, and it also involved terminal labor and this fact of the officers and employees of Northeast Marine and Northeast Stevedoring was gone into in detail, and the application for insurance showed that the same officers and so forth, and I think we can eliminate a lot of testimony if we—if you will accept those minutes in evidence.

MR. KIMBALL: Let me just make one other remark and then, of course, we will get Your Honor's ruling.

We are here for a very simple thing; that is, to obtain Your Honor's decision as to whether this claimant is jurisdictionally within the scope of the Act.

It may be even if one or the other of the parties is dissatisfied with your determination, and I have no reason at this moment to believe that I will or will not be, and—an appeal will be taken, and I accept that totally from you.

Wouldn't it be a shame if one party, my employer or client, had to take an appeal from this determination on constitutional grounds, because it was denied due process of law, because somebody put in evidence some sort of a record in some other proceeding which I know nothing about, some State Insurance Fund personality came in here and may or may not have testified to certain things, totally without [26] any binding effect whatsoever upon my client, and were it received I do believe that it would transgress fundamental constitutional guarantees.

So I respectfully suggest that the application by Mr. Gucciardo be denied, if for no other reason, on that grounds. It is a simple case. It ought to be kept simple.

JUDGE HOWDER: Mr. Gucciardo, what precisely is that again?

Will you tell me what that is again, that document?

MR. GUCCIARDO: Well, I am only reading from the director's brief in that particular case, because I happen to have it with me, and it identified the case. But it is a case wherein I represented Gasper Scalmato against Northeast Marine Terminal.

JUDGE HOWDER: Is this a matter of public record?

MR. GUCCIARDO: Yes, but I don't have the minutes with me, except that I can obtain them and submit it to Your Honor for your edification.

JUDGE HOWDER: Well, I would prefer to do it that way.

Why don't we, when we adjourn this hearing, make a motion, post-hearing motion, in that respect?

MR. GUCCIARDO: I will renew my motion at that time.

JUDGE HOWDER: We will give Mr. Kimball the right to oppose that motion, and I don't know whether I will [27] accept it or reject it.

MR. GUCCIARDO: Then I will have to follow this line of questioning, if you will allow me.

JUDGE HOWDER: What do you think the materiality of the questioning is?

MR. GUCCIARDO: Under the Longshore Act, it says specifically longshoremen and longshore activities.

I am trying to show that this man, as a longshoreman in his activities, be he terminal labor or be he ship labor, is covered within the meaning of the Act, and the mere fact that they have two companies, for whatever purposes they see fit to have these two companies, for all intents and purposes it is one company operated by the same men, except that when the men go on the ship they put them on the stevedoring company payroll, and when the men work on terminal labor, they put them on the marine company payroll.

I say that if the men are the same, the timekeeper is the same, the hiring boss is the same, the pier superintended is the same, the safety man is the same, then we are piercing the corporate veil to that extent, and the operation should be considered a single operation as far as this claimant is concerned, and as far as interpreting the Act is concerned.

JUDGE HOWDER: This is your position and you would like to document that?

[28] MR. GUCCIARDO: Yes, sir.

JUDGE HOWDER: I will allow you to do that.

MR. GUCCIARDO: Thank you.

BY MR. GUCCIARDO:

Q Now, Mr. Caputo, whether you work for Northeast Marine or Northeast Stevedoring, is the pier superintendent one and the same?

MR. KIMBALL: Objection.

JUDGE HOWDER: I understand you have a continuing objection on this line.

MR. KIMBALL: On multiple grounds, that it is irrelevant to these proceedings and that this witness is incompetent to give the testimony which he is being asked to, and from his mouth it is an opinion or conclusion by him without necessary foundation having been laid that he knows what he is reciting.

JUDGE HOWDER: I understand that.

You may proceed, Mr. Gucciardo.

BY MR. GUCCIARDO:

Q Would you answer the question, Mr. Caputo? Is the pier superintendent the same for Northeast Marine as it is for Northeast Stevedoring Company?

A The only answer I have for that question is that for the Northeast Stevedoring, Pete Spannow is for the ship; the other gentleman was for the terminal labor, is Joe [29] Piganno. He died about two months ago.

Q Who is the pier superintendent?

A The pier superintendent, no one knows that. It is the labor boss.

Q The labor boss?

A Yes, and Pete Spannow, he is the supervisor on the ships.

Q There is such a thing as ship foreman?

A Yes.

Q And there is such a thing as terminal labor foreman?

A Yes.

Q And then there is a pier superintendent?

A Superintendent on the ship, a gentleman by the name of Mr. Walsh and Mr. Viola.

Q Do these—Mr. Walsh and Mr. Viola, do they work for both companies?

A That I couldn't answer.

MR. KIMBALL: Objection, Your Honor, that is so flagrant. Move to strike whatever he said. How would he know?

BY MR. GUCCIARDO:

Q How long have you worked for Northeast Marine and Northeast Stevedoring Company?

A On and off in the last twenty years.

Q Do you know who the foremen are and the bosses are, [30] generally?

MR. KIMBALL: Objection.

THE WITNESS: The same one during the last—more or less during the last twenty years.

BY MR. GUCCIARDO:

Q Have they been the same, more or less, within the last twenty years as well as on the date of your accident?

A Yes.

Q Now, when you were hired, you said you were hired by, I believe it was, Tommy or Tony Costa?

A Tommy Costa.

Q Who is he—I don't know if you stated that for the record. Was he the hiring agent?

A That is right.

Q After you are hired by the hiring agent at the hall, what do you do?

A Go directly down to the pier, to the timekeeper to report.

Q Is this the same timekeeper for Northeast Marine Terminal as Northeast Stevedoring?

A The same one.

Q You checked in with the timekeeper?

A You check in with the timekeeper and he tells you to see the labor boss.

Q Who was the labor boss?

[31] A At that time it was Tommy Googan.

Q Did you report to him?

A I approached him. He assigns you to your position.

Q Where did he assign you that day?

A That particular day he assigned me to trucks.

Q What does that mean specifically, assigned you to trucks? What do you do?

A Loading trucks.

Q What do you load them with?

A We take the cargo off the pallet. The machine brings it to the tail of the truck and we use a dolly to bring it all the way in.

Q Are you finished?

A In case there is another piece, process of loading or unloading the trucks, they have a platform. When there is no room on the platform, you have to use a dolly. That is the only time it is necessary for you to load a truck when the platform is already full.

Q This cargo that you are loading the truck with, where does it come from?

MR. KIMBALL: Objection.

THE WITNESS: From Yugoslavia.

JUDGE HOWDER: One moment now.

Have we established the general duties sufficiently in the record for your purposes?

[32] MR. GUCCIARDO: Not yet, Your Honor. I will get to it.

JUDGE HOWDER: I would like you to finish up with this line and move in on what he was doing the particular day when the accident occurred.

MR. GUCCIARDO: Okay.

BY MR. GUCCIARDO:

Q This cargo, where did you say it came from, the Yugoslav ship?

A Yes.

Q Now, as far as you know, is all of the cargo in that terminal—I am sorry, I think you stipulated to that, so I don't have to go into that point.

Mr. Kimball, is that correct? That all the cargo on that pier either comes off a vessel or is going on a vessel?

MR. KIMBALL: That is true.

MR. GUCCIARDO: All right, I will skip that.

BY MR. GUCCIARDO:

Q When you are assigned as terminal laborer, if your truck work of loading the truck is finished, could you be assigned to unloading a lighter if there is a lighter available?

A Yes.

MR. KIMBALL: Objection.

[33] BY MR. GUCCIARDO:

Q Could you also be assigned to loading ship stores?

MR. KIMBALL: Objection.

THE WITNESS: Yes, sir.

BY MR. GUCCIARDO:

Q Have you ever loaded ship stores for this particular Northeast Marine Company?

A Yes, sir.

Q How many times would you say you have loaded ship stores for this company?

A I average around seven times.

Q What do you mean seven times, over what period of time?

A Within a period of about seven to ten years.

Q When you load ship stores, what do you do specifically? Will you advise the Judge?

A Well, the ship stores, we bring the cargo to the storerooms.

Q On board a ship?

A On board ship.

Q And you take the cargo from where, the dock?

A From the dock.

Q Now, if your assigned work of loading a truck is finished, can you also be assigned to a lighter?

A Certainly.

[34] MR. KIMBALL: Objection.

BY MR. GUCCIARDO:

Q What would you do on the lighter?

MR. KIMBALL: Objection, hypothetical.

THE WITNESS: You have to load the lighter: sometimes you have to discharge the lighter.

JUDGE HOWDER: Is this hypothetical or has it occurred in his experience before?

MR. GUCCIARDO: I will come to that. It is not hypothetical. That is why I object to counsel testifying, by his objections.

JUDGE HOWDER: Let us not get into that.

BY MR. GUCCIARDO:

Q Have you loaded and unloaded lighters that were afloat in the Gowanus Bay at Pier 39th Street in Brooklyn Terminal for Northeast Marine?

A Yes, sir.

Q You said you worked for Northeast Marine some twenty years?

A That is right, on and off.

Q Could you tell us, on a percentage basis, what percentage of your time you actually work on barges or lighters that are afloat or loading ship stores, as compared to work done physically on the dock?

MR. KIMBALL: Your Honor has in mind, of course, [35] my objection to the relevancy of this testimony?

JUDGE HOWDER: Yes, I do, and I will give it very serious consideration.

BY MR. GUCCIARDO:

Q Will you answer the question, please?

A I believe about twenty percent.

Q Twenty percent what? On the ship or on the dock? On the barges or on the dock?

A On the lighters.

Q On the lighters. Now, on the day that you were injured, April 16, 1973, were you physically located within the terminal area commonly known as 39th Street, Brooklyn?

MR. KIMBALL: That has been stipulated.

We have a stipulation which I think even Mr. Justice Cardozo has characterized as the highest form of proof.

Now, a question which elicits testimony from this witness about which we have already stipulated, I don't know how to deal with.

Suppose he testified something contrary to the sipulation, then where are we? We either have stipulations or forget about testimony in that area. I don't want it both ways, because it makes me nervous.

JUDGE HOWDER: Mr. Kimball, has he testified contrary to your knowedge so far?

[36] MR. KIMBALL: Not at the moment.

JUDGE HOWDER: Now, it is not your purpose to elicit contrary information?

MR. GUCCIARDO: No, I stated in the beginning that I may ask questions that have already been stipulated only to get the continuity, and there was no objection at that time.

JUDGE HOWDER: Would you accept the stipulation over his objection if it was at variance?

MR. GUCCIARDO: Yes, I would accept the stipulation.

MR. KIMBALL: The way to handle that, that is one of the few areas where leading on direct is entirely permissible.

When he starts off and states "it has been stipulated", blah, blah, blah, and then you work on from there, rather than risk asking the witness a question which might elicit testimony contrary to a stipulation.

JUDGE HOWDER: Is that agreeable to you?

MR. GUCCIARDO: Certainly it is, but I am being careful. No matter how I twist and turn.

Now he wants me to do it, so I don't know how I stand.

JUDGE HOWDER: That is neither here nor there.

I want the record to be clear on the point that [37] you make. It has been stipulated, and I will accept that.

I would ask you to be careful in asking questions in this area.

BY MR. GUCCIARDO:

Q Do you know who owned this truck that you were loading?

A Tomaselli Brothers.

Q They had nothing to do with Northeast Marine, as far as you know?

A No.

Q Was the truck physically located within the terminal area when you were injured that—

MR. KIMBALL: That has been stipulated, and it was shown on Respondent's Exhibit 1.

MR. GUCCIARDO: The question is withdrawn.

JUDGE HOWDER: The question is withdrawn.

BY MR. GUCCIARDO:

Q Now, will you state briefly what you were doing when the accident happened, and how it occurred?

A My checker called me and told me to go out to the Tomaselli truck—

Q Let me interrupt you a minute. What is the function of a checker?

A A checker, he is a man who checks the cargo, counts how many pieces are on the pallet that goes inside [38]

the truck. They bring it to the truck, and in doing so the driver and I waited. The first draft came to the truck and the driver and I were standing by the pallet, and in doi-g so we got a clearance of the dolly, and he told him to put the load down on the dolly, and in doing so—

Q The machine driver is a hi-lo driver?

A Hi-lo driver.

Q Is he lifting the pallet, the draft?

A The draft that landed on the dolly. Now, at times we have to ask the machine driver to give us a little push. Sometimes the trailer is forty-foot, sometimes they are 45-foot. So we told the driver, and he says, All right, I will give you a push. He gave us a push, and he was pushing the dolly down to the rear of the trailer. I happened to be on the righthand side. The driver was on the lefthand side. In doing so, I was going back, back, back, I figured that the floor was level, not knowing that there was a backstop. In doing so, I fell backwards, and in doing so my left foot went under the bottom of the dolly. My right foot was clear because there was enough space of the draft—

Q Were you injured?

A Yes, sir.

Q Did you stop work immediately?

A I stopped work immediately.

Q What time was this, about?

[39] A Roughly, I would say, between 1:30 and 2 o'clock, around that time.

Q What time had you been hired that day?

A That day I was hired between 8:30 and 8:40 a.m.

Q What had you been doing in the morning?

A Doing what I had been regularly.

Q That is, loading trucks?

A Loading trucks.

Q You went to lunch?

A Went to lunch and then had this accident.

Q Was that the first draft being put on the truck when you had the accident?

A The very first one.

Q You referred before to palletized cargo, and then you mentioned draft. Is that the same to you?

A That is terms of the language that we use.

MR. GUCCIARDO: I have nothing further.

CROSS-EXAMINATION

BY MR. KIMBALL:

Q Mr. Caputo, I understand that day you were hired out of the hall, is that correct?

A That is correct, sir.

Q And you did not regularly work at the so-called 39th Street Terminal in those days, did you?

A Not as a regular man. Extra man.

[40] Q You were what they call an extra man?

A Extra.

Q And if I heard correctly, the labor boss that day assigned you to the trucks, is that correct?

A Terminal labor.

Q And you worked trucks in the morning up until lunchtime?

A That is right, sir.

Q Then you took your lunch, is that right?

A Yes.

Q Then you came back after lunch and you went back to working trucks?

A That is right.

Q And there came a time when you were told to work the Tomaselli Brothers truck?

A That was the first job that I got when I checked in.

Q When you checked in after lunch?

A One o'clock, that is right.

Q And you had been doing the same kind of work in the morning on trucks of other companies?

A That is right, sir.

Q At the time you got hurt, you were working inside the Tomaselli Brothers truck, is that right?

A That is right, sir.

[41] Q You mentioned that you were using a dolly, is that something that you put packages on and then you push it inside of the truck?

A That is what they use when the draft comes down. There is a little object that loads it on.

Q And your job was to push the dolly inside the truck, is that correct?

A That is correct, sir.

Q On top of the dolly, were these cartons or cases?

A Cases, they were.

Q Is that right?

A Cases.

Q Now, is it true, then, what you were doing is the sort of work that has to be done inside a truck whenever they load it with a dolly?

A That is right.

Q Or, for that matter, whenever they unload it with a dolly, you have to do the same kind of work?

A That is right, sir.

Q That sort of work has to be done whether the truck is on the terminal, whether the truck is at the warehouse, whether the truck is outside the courthouse, wherever the truck is, if they are going to load it or unload it with a dolly, somebody has to do the kind of work that you were doing that day; is that right?

[42] MR. GUCCIARDO: Objection.

THE WITNESS: That is right, yes.

MR. GUCCIARDO: Excuse me, don't answer the question.

MR. KIMBALL: He has already answered yes.

MR. GUCCIARDO: There is no evidence that the truck is loaded in a courthouse or outside of the terminal, or anything like that. That is all of a figment of his imagination and has no bearing on the record.

JUDGE HOWDER: I will let the witness answer the question.

MR. GUCCIARDO: I think he already has.

What did you say your answer was?

THE WITNESS: Yes.

BY MR. KIMBALL:

Q Now, this truck was to take these goods some place, is that right?

A I didn't hear that.

Q I say, after you finished loading these trucks, then they drove out of the terminal and went some place; is that right?

A They go right out.

Q They went to deliver these goods to wherever they belonged?

A Wherever they have to go to.

[43] Q That could be any place in this area, or any place in the country?

A We are not allowed to ask where they are going. If we ask them, they are not supposed to answer.

Q When they get where they are going, then somebody has to unload those trucks, is that right?

MR. GUCCIARDO: Objection, immaterial to these issues.

THE WITNESS: Yes, sir.

JUDGE HOWDER: I will allow him. I want to give him the same—

MR. GUCCIARDO: Will you instruct the witness, when he hears me object, not to answer until you rule on it?

JUDGE HOWDER: Yes, Mr. Witness, don't answer the question until I have ruled on it.

THE WITNESS: I understand.

BY MR. KIMBALL:

Q Now, would you say that the risk of getting hurt as you did while pushing a dolly inside a truck was more, less, or about the same, regardless of whether the truck was on a terminal, whether the truck was in the street outside the court here, whether the truck was any place in New York City, to say the risk was the same, more or less?

MR. GUCCIARDO: Objection.

MR. KIMBALL: Basis?

[44] MR. GUCCIARDO: Immaterial what the degree of risk is anywhere. The fact is that the accident occurred, it has been stipulated to.

JUDGE HOWDER: There is a line of argument which I have heard several times that the Longshoremen's Act, the amendment came into being because of the high risk of injury in a longshoring area, and counsel have been making this argument in all my cases, and I think the question is somewhat hypothetical as far as the witness is concerned; but I will let him answer it to the best of his ability.

MR. GUCCIARDO: Then I will voice the objection on the grounds that he is not competent to answer what the degree of risk is and he is not trained in that field.

JUDGE HOWDER: Well, it is a matter of weight. I will let him answer the question.

You may answer the question.

BY MR. KIMBALL:

Q Would you like to have the question repeated, so that you can give it a fair answer?

A I wouldn't know.

Q You don't know the answer?

A I wouldn't know.

Q You say you would not know what?

A No, because I don't know where that truck is going to.

[45] Q Was the truck moving while you were loading it?

A No, the truck is supposed to be shut.

Q So that it cannot move?

A It cannot move. We are taking the driver's word.

Q What is the area, the surface area like, where that truck was? Is it concrete?

A Concrete area.

Q Is it sort of like a driveway in there?

A No, one big yard.

Q A big concrete yard?

A That is right, sir.

Q Is it relatively flat there, bumpy, or what would you say?

A I should say very flat, sir.

MR. GUCCIARDO: Your Honor, at this time I want to object to this line of questioning.

If it is counsel's purpose to show that there is various risks involved in different types of activities not on the waterfront, I readily stipulate to that.

JUDGE HOWDER: Would you accept that stipulation, counsel?

MR. KIMBALL: If I understand it correctly, you are prepared to stipulate with me that the work which this man was doing at the time he was injured had no risk involved peculiarly associated with longshoring; is that [46] correct?

MR. GUCCIARDO: I believe my stipulation was quite clear. All I said was that the incidence of risk may be more or less away from the waterfront than it is on the waterfront, or in the terminal area, and that various insurance companies even charge a different rate if you are unloading a truck on the street as compared to a terminal area.

It still has no bearing on these proceedings.

MR. KIMBALL: I will stipulate to the fact up to the point where you injected that it had no bearing.

I won't stipulate to that, but I will stipulate everything up to that point, if you like.

MR. GUCCIARCO: Providing you abandon the line of questioning.

MR. KIMBALL: I think that is only part of the story.

JUDGE HOWDER: Could I be clear on the record what the stipulation is?

MR. GUCCIARDO: I am withdrawing it because he doesn't want to abandon his line of questioning.

I would only stipulate to it if he abandons his line of questioning.

Go ahead.

MR. KIMBALL: You don't want to stipulate?

MR. GUCCIARDO: Come on, Mr. Kimball, we are not [47] playing games.

JUDGE HOWDER: Off the record.

[Discussion off the record.]

JUDGE HOWDER: Back on the record.

From my discussion with counsel, I understand that it is stipulated that the same witness, Mr. Caputo, doing the exact same activity in the truck would have the same risk factor of injury, whether he were doing that activity on the terminal or off the premises of the terminal; is that correct, gentlemen?

MR. GUCCIARDO: Using the same type of equipment.

JUDGE HOWDER: Using the same type of equipment. All conditions being the same.

MR. KIMBALL: That is agreeable.

MR. GUCCIARDO: Yes.

BY MR. KIMBALL:

Q Mr. Caputo, just to be clear in my mind, the equipment which you were using was a dolly, is that correct?

A Correct.

Q Would you describe the dolly a little bit for us? Was it a two-wheeled or four-wheeled dolly?

A A six-wheeled dolly, three wheels on each side.

Q Where did the dolly come from, do you know?

A The dolly?

Q Yes.

[48] A The dolly is supposed to be kept inside the terminal, laid against the wall.

Q Does the dolly have sides or completely flatbedded?

A Completely flat. There is an opening in the center. There is a narrow strip on the side where there is cast-iron wheels.

Q And the purpose of the dolly, you told me, is to land these drafts or cargo on top of it?

A That is right.

Q Then, because the dolly has wheels on it, why, you can roll the cargo?

A Pull it with a rope, yes.

Q Easier than a man could carry the cargo, it is quicker to use the dolly?

A Correct.

Q Now, after you got the dolly inside the truck, where you want it, then do you have to take the cargo off the dolly?

A That is correct.

Q And you put it into stow, so-called?

A Yes.

Q Then you go back with the dolly and get another draft?

A That is correct.

[49] Q That is the sort of work you were doing at the time you got hurt?

A Yes.

MR. KIMBALL: I have no further questions on cross at this time, Your Honor.

Well, Mr. Goldstein wants to advise me, and I need his advice, if I may, Your Honor.

JUDGE HOWDER: Certainly.

[Discussion off the record.]

BY MR. KIMBALL:

Q Let me ask you another. We are getting out of the—you have been working on the waterfront about how many years did you say?

A Twenty-eight years.

Q You say you have been working sometimes on ships and sometimes on lighters and sometimes in the terminals for the last 28 years, is that correct?

A That is correct.

Q Now, on this particular date, which is April 16, 1973, if I understand correctly, you hurt your left big toe; is that correct?

MR. GUCCIARDO: Objection, Your Honor, that is not what we are claiming. We are claiming the foot.

MR. KIMBALL: I don't care what they are claiming. I want to know what the witness's answer is.

[50] I don't believe it is appropriate for counsel to get up and advise the witness what his claim is.

MR. GUCCIARDO: Except there is a stipulation on the record that Mr. Goldstein and I would go into this and agree on it, and—

MR. KIMBALL: On the schedule.

MR. GUCCIARDO: Yes, on the schedule. Will you hold the record one moment, please?

JUDGE HOWDER: Off the record.

[Discussion off the record.]

JUDGE HOWDER: Back on the record.

MR. GUCCIARDO: May we have it indicated on the record that with respect to the previous injury sustained, we had a discussion and counsel was satisfied that—not counsel—

JUDGE HOWDER: The only injury I have on this record is the one of April 16, 1973. There is nothing on this record or there may be a prior claim.

MR. GUCCIARDO: Yes, but they are raising this in the event there is a schedule loss they are entitled to credit. It does not appear that he received any money to it, and therefore he is not entitled to any credit.

Mr. Goldstein and I will probably check this out and check whatever records are necessary and agree as to that part of the case.

[51] JUDGE HOWDER: What do you want to do as far as the present record is concerned?

MR. GUCCIARDO: Just terminate it. As per the agreement with Mr. Goldstein and myself. I don't think it goes to the merits of the claim on the basis of jurisdiction at all.

BY MR. KIMBALL:

Q Mr. Caputo, when the—whoever it was sent you over to the Tomaselli Brothers, did he send anybody along to help you?

A He only assigned one man.

Q Where was the truck driver at the time, do you know?

A The truck driver was outside the truck.

Q Now, during the morning when you were doing this same sort of work on other trucks, did they assign you alone or did they send somebody with you?

A Just me and the checker and the machine driver.

Q And during the morning, did you see any truck drivers who were doing anything in connection with the work which you were doing in the morning?

A Yes, sir.

Q What were they doing?
A Same kind of work I was doing.
Q In other words, the truck drivers, while you are doing the loading, they are also loading their own trucks?
[52] A They have to help you load the trucks.
Q They have to help you, is that right?
A Certainly.
Q So, actually, when they assign one man to a truck, you really wind up with two men doing the work, the man assigned and the driver?
A Correct.
Q So you tell me this was the very first dolly load that you had taken on the Tomaselli Brothers truck; is that correct?
A Yes, the first time.
Q But if the job had gone in the usual way, the truck driver would have been helping you finish that load?
A It would have taken a long time.
Q It was a big truck?
A Certainly.
MR. KIMBALL: No further cross-examination, Your Honor.

REDIRECT EXAMINATION

BY MR. GUCCIARDO:

Q This dolly, does it belong to Northeast Marine Terminal?
A Yes, sir.
Q Did you ever work for any stevedoring company outside of a terminal area?
[53] A No.
JUDGE HOWDER: I think that is clear in the record. We don't have to go into that.
MR. GUCCIARDO: I have nothing further.
JUDGE HOWDER: I have one or two questions I would like to ask.

What type of cargo was this, and if—
MR. GUCCIARDO: We stipulated cheese, but I am not sure.
MR. KIMBALL: There was a little doubt in Mr. Gucciardo's mind, but I think I can clear up Your Honor, because I am holding the bills of lading here.
MR. GUCCIARDO: If he says there were cheese, but he doesn't know. They were cases.
MR. KIMBALL: They were wooden boxes of cheese, Your Honor. The bill of lading indicates there was a total shipment of 1,279 cases of cheese.
Now, whether all of that shipment was going on this truck, we do not know. But that was the commodity being loaded at the time.
JUDGE HOWDER: Okay.
Mr. Caputo, how did that cargo come off the vessel?
Did it come off in a sling or a pallet? And again I want to remind you that if anything I ask is included in the stipulation, please remind me.
[54] MR. KIMBALL: He wouldn't know, because he wasn't involved in the discharge. The discharge was five days before, and he was not then employed at this facility.
JUDGE HOWDER: Now, where did you pick the cargo up first? Was it on the ground outside the truck?
THE WITNESS: No, see, the cargo is already on the pallet.
JUDGE HOWDER: On the pallet already and how far from the truck was the pallet?
THE WITNESS: Right near the truck.
JUDGE HOWDER: It had been loaded on a pallet?
THE WITNESS: Yes.
JUDGE HOWDER: And it was on the ground or on a pallet?
THE WITNESS: On the ground, and the machine driver comes over with his fork and picks it up and loads it on the dolly.

JUDGE HOWDER: A fork lift picks it up on the dolly?

THE WITNESS: That is right.

JUDGE HOWDER: At this point you came in to play and picked up the dolly and did whatever, unloaded the dolly in the truck?

THE WITNESS: Yes.

JUDGE HOWDER: Is all this clear in the record now?

MR. GUCCIARDO: Yes, but just to clarify further, [55] may I be permitted to ask one or two more questions?

JUDGE HOWDER: Very well.

BY MR. GUCCIARDO:

Q Can this pallet, that was loaded with the cheeses, be unloaded from the vessel exactly the way it was lifted by the machine?

MR. KIMBALL: That is a hypothetical.

THE WITNESS: Identically the same way.

BY MR. GUCCIARDO:

Q Is that the usual method of unloading palletized cargo from a vessel?

A Yes, sir.

Q Is it the usual method to unload it, leave it on the dock until the consignee is advised to pick it up?

A They bring it inside the terminal.

Q then what is done as far as giving notice to the consignees?

A They either put it on the location papers, they turn it into the office. When the driver comes down, that is the first thing he does.

Q Who send the driver down to pick up?

A The delivery clerk.

Q But before the driver gets on the pier, who gives him the instructions to come to the pier to pick up the cargo?

[56] JUDGE HOWDER: I wonder if he knows that.

THE WITNESS: The consignee, the owner of the merchandise.

BY MR. GUCCIARDO:

Q Do you know this of your own knowledge, that this is the procedure that is followed?

A My own knowledge, I know that.

Q Then up until the time that the consignee's truckman takes it out of the terminal, this is maintained and stored by Northeast Marine Terminal?

MR. KIMBALL: Objection, Your Honor.

THE WITNESS: That is right.

BY MR. GUCCIARDO:

Q Do you know what happens by way of charging, if the cheese remains on the pier after, say, five days or whatever the—

A They have to pay a certain charge.

Q What charge is that? Do you know what it is?

A That I could not tell you.

Q Do you know what the usual period is that they have to pay, after which they have to pay a certain charge?

A No.

MR. GUCCIARDO: Nothing further.

MR. KIMBALL: Now, I have to ask a couple, if you—Your Honor will permit.

[57] JUDGE HOWDER: Sure, go right ahead.

RECROSS-EXAMINATION

BY MR. KIMBALL:

Q You described this area where the truck was as a great big—what would you say it was, a kind of square-shaped?

A Yes.

Q And concrete-covered?

A Concrete.

Q That is the area which they used to load and unload trucks, is that correct?

A That is correct.

Q Now, you were asked a question about free time and demurrage, do you know about those things?

A Pardon?

Q I say, how do you spell demurrage?

MR. GUCCIARDO: I never used that word in my questioning.

I asked him if there was a charge made. I am not sure that he knows it.

JUDGE HOWDER: You may ask the question.

BY MR. KIMBALL:

Q Have you ever heard the word "demurrage"?

A On a pier?

Q Any place in your whole life.

[58] A No, outside of the waterfront, I never heard of it.

Q What is it, do you know?

A Demurrage is when the consignee does not come down and pick up his cargo at the proper time.

Q Have you ever had anything to do with demurrage?

A It is not my line of work.

Q Do you know anything about what the charges are, how much?

A No.

Q Or for how many days, or whether it includes Saturdays and Sundays?

A As I said before, I don't know.

Q It is not your line of work?

A It is not my line of work.

MR. KIMBALL: Thank you.

JUDGE HOWDER: I would like to ask the witness: This place where the truck was, that is not a covered area, is it?

THE WITNESS: No, it is an open area, sir.

JUDGE HOWDER: But this is a common place where trucks come to pick up their cargo?

THE WITNESS: Yes.

JUDGE HOWDER: When the cargo is stored outside?

THE WITNESS: That is right.

JUDGE HOWDER: Okay.

[59] Anybody have any further questions?

MR. GUCCIARDO: Your Honor, I think maybe you had a misconception there.

Maybe counsel will agree with me. That cargo is put in the storage shed and then taken out of the storage shed and then put on the truck.

So that the outside open area may or may not, in this particular pier, have any storage, I don't know, but that wasn't the testimony, I don't believe.

MR. KIMBALL: Your Honor, I would be prepared to stipulate, subject to Mr. Gucciardo's agreement or disagreement, and since I am doing this on the record in open court, the option is entirely his.

But I would stipulate that it is probable to a reasonable certainty that during the five days, between the time this cheese was discharged and the time that Mr. Caputo was beginning to load it into the truck, it was kept in one of the warehouses, which formed the perimeter of this open area, which I think is commonly called a yard. It is an open concrete area used for the purpose which the witness has testified.

So I will stipulate, if Mr. Gucciardo wants, that it is probable to a reasonable certainty that the cheese was kept in one or another of the buildings which are shown almost encircling the yard on the map, which Your Honor has [60] before you, Respondent's Exhibit 1.

MR. GUCCIARDO: I agree with that, and I think counsel will also stipulate that in order for this truck to get on the premises they have to go through a guard gate maintained by Northeast Marine Terminal.

MR. KIMBALL: Most assuredly, because we have security over there.

JUDGE HOWDER: Will counsel agree that after the cargo is—you say reasonably probable that it is kept in the sheds, that the cargo was then taken from the shed and deposited at the place where the truck was to receive it?

MR. KIMBALL: That would be the procedure, yes, Your Honor.

JUDGE HOWDER: I have no further questions of the witness.

You may step down. Thank you very much.

[Witness excused.]

JUDGE HOWDER: Do either counsel have any more points to make at this time?

MR. GUCCIARDO: No, Your Honor. I have no further witnesses.

MR. KIMBALL: You rest?

MR. GUCCIARDO: I rest if that is the way you want it.

MR. KIMBALL: Both sides rest, Your Honor. I won't [61] call any witnesses.

JUDGE HOWDER: I would like to remind counsel for claimant that should you be successful in this proceeding you must follow the procedure for asking for fees outlined in 20 CFR 702.132.

Mr. Reporter, would you please mail the copy of the transcript to the Office of Administrative Law Judges, Suite 720, 1111 Twentieth Street, Northwest, Washington, D.C. 20036.

Now, let us go off the record.

[Discussion off the record.]

JUDGE HOWDER: Back on the record.

I have set the date of December the 2nd, 1974, as the date on which I would like to receive the briefs of the parties in this matter, and I have requested that each of them serve a copy of their briefs on the Associate Solicitor for Employee Benefits of the Department of Labor.

Did you have something further, Mr. Gucciardo?

MR. GUCCIARDO: I would like to make closing argument. I may, under the circumstances, since no controverting testimony was presented, make the closing argument in lieu of the brief.

JUDGE HOWDER: Would you like to make a closing argument in lieu of the brief?

MR. GUCCIARDO: I may, under the circumstances. [62] I am wondering if you could not allow me the same thing you did yesterday, let him submit his brief first and if I want to answer it, give me five days to answer it.

JUDGE HOWDER: I think in this case I would like to receive them both simultaneously.

MR. GUCCIARDO: I still would like to make closing argument.

JUDGE HOWDER: You may do so, and would you also refer to your motion?

Let me state for the record that Mr. Gucciardo has a motion that he wants me to receive a document into evidence, and I have indicated that I would like him to make that motion in writing, to give Mr. Kimball a chance to respond to it.

Would you please identify the document again, Mr. Gucciardo?

MR. GUCCIARDO: Yes, I move that the minutes specifically referring to the trial of Gasper Scalmato Docket No. 74-LHCA-203, referring to the testimony of Mr. Chertoff, C-h-e-r-t-o-f-f, be made a part of the record

and my reason for this motion is that Mr. Chertoff is the underwriter for State Insurance Fund, and he testified with reference to the insurance policies and the interrelations of the companies involved herein, and the coverage extended and the State Insurance Fund at that time was represented by [63] counsel, Mr. Foley, and had adequate and ample opportunity to cross-examine the witness.

And I think, in view of the rules, not only the rules and regulations, but the law, that the rules of evidence do not apply and Your Honor is privileged to make any investigation that he sees fit that this should properly be made a part of the record.

JUDGE HOWDER: I would like you to make that in writing.

MR. KIMBALL: I would just like to put both the judge and the record on notice that if that document were received over my objection, I would thereupon probably move to reopen these proceedings for the purpose of eliciting additional testimony.

JUDGE HOWDER: Thank you.

Your closing argument?

MR. GUCCIARDO: Just one further statement.

May I state that two weeks ago, when the Chief Judge was down here, he suggested that we follow this procedure of submitting expert testimony that is similar in nature on the issue of jurisdiction in one hearing, and having the minutes available in another hearing, without going through the procedure of taking the testimony in the interest of expediting the cases?

JUDGE HOWDER: I wasn't here.

[64] MR. GUCCIARDO: This is precedent for what I am asking you to do and, aside from the precedent, there is valid legal reason for you to accept the motion.

JUDGE HOWDER: I will be glad to hear from you in that respect in writing, and you may make a brief closing argument.

MR. GUCCIARDO: The claimant in this case is basically a longshoreman. Longshoremen come under different categories, sub categories, that is.

There are longshoremen that work in the hold of a vessel, as you heard, and load and unload cargo from the vessel, work on the string piece, hooking and unhooking drafts; and there are longshoremen who work in the terminal area, who prepare the cargo to be loaded on the vessel and also prepare the cargo for individual delivery to the consignees.

All of these activities, be it a checker, be it a gangway man or be it a hold man, comes under the general classification of longshore work.

Prior to the amendment to the Act, the Supreme Court specifically stated that the Longshore Act could only apply to those accidents occuring on the navigable waters and in the Nacerema case—I will give you the quote in the brief; I don't, unfortunately, have it now—the Court invited Congress to change the law if that is what they [65] wanted.

Congress took that invitation up and in fact changed the law and said: including any adjoining drydock or terminal area.

Now, we come to the specific point being raised by my adversary, and that is, he says it does not make any difference what his classification is or what he does normally. It is what he is doing at the time.

I say to Your Honor, that is not an argument to be accepted. It is what a longshoreman generally does that is important, and did Congress intend to cover this particular person under those sets of facts?

It is admitted by counsel that the only cargo handled by Northeast Marine is cargo either going on board a vessel or being—or having been taken off a vessel; and all of this goes to the loading and unloading of a vessel.

You should not be constricted in making your determination that the vessel is in fact loaded when the draft is

picked up from the string piece and put into the hold of the vessel.

This is not the narrow view that was intended by Congress nor is it the view that had been decided by the courts in other cases.

I remind Your Honor that under the law, that all questions of fact or reasonable questions of fact ought to [66] be decided in favor of the claimant.

I also remind Your Honor that under section 920, the Act was intended to benefit employees who are working as longshoremen and there are certain presumptions which prevail.

There is even a presumption of jurisdiction as recited in the Eugene McMullen case by the Circuit Court within the past year.

That particular court stated that where the employer went out and got insurance for a specific purpose, then, obviously, they must have believed that they were subject to the Act or they wouldn't—would not have gotten the insurance.

The court specifically said in that case that the presumption of jurisdiction prevailed, although, admittedly, there was a case involving the Defense Base Act occurring in Africa, but under the law the Defense Base Act is administered in accordance with the terms of the Longshoremen's Compensation Act.

But what is important in that particular decision is that it created two presumptions that I have previously stated. I am very familiar with that case because I argued that case myself in the Circuit Court of Appeals.

Now, as to whether or not counsel intends to raise, whether Congress did in fact have the constitutional right [67] to legislate it, he hasn't so stated, but I have to presume that he is going to follow suit as other counsel have, representing employers in this particular case.

I don't think counsel will argue with me that longshoremen working on board a vessel come under maritime law, and the maritime law is what Congress has specifically designated to enforce under the Constitution.

There is case law, historically, which states that the loading and unloading of vessels was initially done by crewmen and with the advent of modern machinery longshoremen took over this function.

The Supreme Court has stated that for this purpose the longshoremen are considered to come within the maritime law.

The other point as to whether or not Congress can legislate on land, when it is not directly involving the water, I again refer you to Supreme Court decision, such as the Sieracki decision, wherein accidents occurred on land involving a ship—and I know this was on the issue of unseaworthiness, but the Supreme Court has stated that maritime law applies to land where longshoremen are involved.

So that on the constitutional grounds, and on the intent of the law, I would rather not see decisions which are intended to split hairs, as have been made heretofore by the Supreme Court.

[68] This Act was specifically intended, and the Senate Committee Report so states, and so does the House Committee Report so state, that it does not matter on which side of the water's edge a longshoreman is injured. It was the intention to extend the jurisdiction to all longshoremen engaged in loading or unloading a vessel.

A vessel is not truly unloaded by taking the merchandise off the vessel. There are hundreds of consignees sometimes shipping on the same vessel, that cargo has to be separated, the consignees have to be notified, and then they come and pick up the merchandise.

Northeast Marine is not in the business of warehousing. They are in the business of taking the stuff off the ship and giving it to the consignee, that is their sole business.

This is an integral part of unloading a vessel or loading a vessel, as the case may be, and all of the work done by any longeshoreman could, incidental thereto, whether it be in a truck or whether it be directly taking it from the ship, is an unloading operation and that unloading operation does not end until that truck leaves the main gate, which is maintained by the employer.

I submit that since there is no evidence but that the operation was in a manner that I have just summarized, that perhaps even a judgment right from the bench would be in [69] order.

But, in anticipation of appeals and so forth, in view of counsel, that he has been hired, I would not request that you make your determination direct from the bench, although I cannot see how any other determination can be made in the light of the Minninni decision, decided by Judge Geraghty, in the light of the Adkins decision, in the light of the Scalmato decision, and in light of the Coppollino decision.

All of these decisions that I have just mentioned are administrative law judge decisions in favor of the claimant in similar circumstances.

Thank you very much.

JUDGE HOWDER: Would you like to say something, or in your brief?

MR. KIMBALL: I hope you will excuse me, Judge, my training is to always have the last word where humanly possible.

I think it is quite so as Mr. Gucciardo has indicated, that if we could only prevail here by the number of cases which respondents have won before administrative law judges, our position is utterly hopeless.

But that is a whole nother area, which we hope we do not have to get into; namely, the pattern of adverse decisions by administrative law judges.

[70] We take this case with Your Honor de novo, as far as I am concerned, and I am confident as far as you are concerned.

JUDGE HOWDER: And you are correct.

MR. KIMBALL: It is a simple case.

We have, as Your Honor so easily recalls, a man who is helping load a truck in a yard. What happened to him, what he was doing, by stipulation, could just as easily have occurred any place else where trucks are loaded or unloaded.

The argument of the claimant's counsel, as I understand it, is: once a longshoreman, always a longshoreman. Without regard to the particular work which the man is doing on the day that he is hurt.

Of course, it does get into the area of congressional intent. We know this whole statute is based upon congressional concern for persons doing work which has a peculiar risk, peculiar to the longshore business, not peculiar to loading and unloading trucks.

One thing for sure, Congress did not intend to put stevedores and terminal operators out of business. Congress did not intend that this social legislation should be wielded like a meat axe to decimate an industry so essential to interstate and foreign commerce.

And so when one is aware, even dimly, of the practical economic effect of, as in the paint company trademark, [71] "spreading this Act around the globe", anybody knows that isn't what Congress intended.

And if the chilling effect of this legislation consequent upon over-enthusiastic application is brought to the attention of the Legislature, there isn't a doubt in the world but what there will be some chopping back of the legislation, particularly at this economic time of our development.

Who could want that, who could, truly interested in the welfare of longshoremen, could want that? I cannot imagine.

So, instead of pushing this law into the furthest possible corner and sweeping everybody under the Act, I for one am confident that after the break in time has

passed, we are going to have administrative law judges and certainly we are going to have review board decisions which say, either in so many words or by the strongest possible inference, some of the things which I have so inartistically attempted to put onto the record before Your Honor this morning.

We will file briefs at the time Your Honor has indicated.

Thank you.

JUDGE HOWDER: Thank you very much.

I am looking forward to receiving your briefs.

[72] Any further matters you would like to discuss on the record at this time?

MR. GUCCIARDO: No, Your Honor.

JUDGE HOWDER: All right.

In accordance with 702 CFR 347, until the briefs have been submitted and the transcript delivered to the Administrative Law Judge, the hearing is not officially terminated.

We will, however, stand adjourned at this time.

[Whereupon, at 12:05 p.m., the hearing was adjourned, with the above stipuation.]

APPENDIX F

GENERAL DOCKET

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPEAL FROM BENEFITS REVIEW BOARD

Case No. 76-4009

NORTHEAST MARINE TERMINAL COMPANY, INC.,

and

STATE INSURANCE FUND,

Petitioners,

v.

RALPH CAPUTO,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

DATE	FILINGS—PROCEEDINGS
1-16-76	Filed petition for review
1-16-76	Served copy of petition under covering letter on respondent
1-16-76	See Scheduling Order No. 1 (PC)
2-26-76	Filed record (original papers of Benefits Review Board)
2- 3-76	Filed motion for amendment of caption, Director, Office of Workers' Compensation Program (w/pfs)

DATE	FILINGS—PROCEEDINGS
2- 4-76	Filed memorandum in opposition to motion to amend the caption, petitioner (w/pfs)
2-10-76	Filed order granting motion to amend the caption
2-27-76	Filed designation of parts of the record to be included in the appendix, petitioners (w/pfs)
3-26-76	Filed stipulation (ordered) extending time to file appellant's brief to 4-7-76 and extending schedule for filing briefs of other briefs one additional week —on consent
4- 7-76	Filed brief and appendix, petitioner (State Insurance Fund) w/pfs
8- 4-76	Returned record (original papers of BRB) (& in 75-4249)
10- 4-76	Filed notice of filing petition for certiorari (SC #76-444)
12-13-76	Filed certified copy of order by Supreme Court granting petition for certiorari

APPENDIX G

TRANSCRIPT OF TESTIMONY

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF THE ADMINISTRATIVE LAW JUDGES

Case No. 75-LHCA-157
Formerly Case No. 2-31357

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act:

CARMELO BLUNDO,
Claimant,

vs.

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,
Employer,

AND

SELF-INSURED,
Carrier.

NTSB Hearing Room, 36th Floor
26 Foley Plaza
New York, New York
Wednesday, December 11, 1974

The above-entitled matter came on for hearing before the Honorable PATRICK G. GERAGHTY, Administrative Law Judge, at 9:28 o'clock, a.m.

APPEARANCES:

On behalf of the Claimant:

ANGELO C. GUCCIARDO, ESQ.
Israel, Adler, Ronce & Gucciardo
160 Broadway
New York, New York 10038

[2] On behalf of the Employer:

LEONARD J. LINDEN, ESQ.
Linden & Gallagher
20 Vesey Street
New York, New York 10007

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EXHIBITS

EXHIBITS	*MARKED*	*RECEIVED*
No. 1 and No. 2	7	—

[3] PROCEEDINGS

JUDGE GERAGHTY: The hearing will come to order, please.

This is a formal hearing de novo, in the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

It is the case of Carmelo Blundo—is that the correct pronounciation, Mr. Gucciardo?

MR. GUCCIARDO: Yes, it is.

JUDGE GERAGHTY: Carmelo Blundo, B-l-u-n-d-o-, Claimant, against International Terminal Operating Company, Inc., the Employer, and is he self-insured, Mr. Linden?

MR. LINDEN: Yes, sir.

JUDGE GERAGHTY: It is Case No. 75-LHCA-157, formerly Case No. 2-31357.

The parties are advised that this proceeding would be conducted in accordance with the provisions of the Act, the rules and regulations of the Department of Labor implementing the Act, and the appropriate sections of the Administrative Procedure Act.

I am Patrick G. Geraghty, the Administrative Law Judge designated by the Chief Administrative Law Judge, to preside at this proceeding.

Would counsel for the claimant please identify himself for the record?

[4] MR. GUCCIARDO: Angelo C. Gucciardo, of the firm of Israel, Adler, Ronce and Gucciardo, 160 Broadway, New York, New York, 10038.

MR. LINDEN: Leonard J. Linden, Linden and Gallagher, 20 Vesey Street, New York, New York, 10007, for the self-insured employer.

JUDGE GERAGHTY: Are counsel ready to proceed?

MR. GUCCIARDO: We are, Your Honor.

I would like to make a brief opening statement relative to stipulations.

JUDGE GERAGHTY: May I get to the formality part before you get to that?

The hearing is being held pursuant to notice issued the fourth day of November, 1974, setting down this matter for formal hearing at this time and place.

Counsel are advised that the decision in this matter will be based on the record made herein today and that any documents, papers or exhibits previously submitted to the Deputy Commissioner are not a part of the record at this time and that if counsel wish such papers to be made a part of the record, they will have to be reoffered.

Now, Mr. Gucciardo, are there some stipulations?

MR. GUCCIARDO: Yes, Your Honor.

There are stipulations which are essentially contained in the memorandum of conference held May 29th, 1974, [5] before John M. Gontaryk.

And as to all the essential facts contained in this memorandum, both sides agree to stipulate thereto, except to the question of jurisdiction, which is the sole question presented to Your Honor for decision.

JUDGE GERAGHTY: Just to be sure, the average wage is $257.69.

MR. LINDEN: That is right, sir.

JUDGE GERAGHTY: That is down at the bottom of the page.

MR. GUCCIARDO: I am looking on the memorandum I am about to offer into evidence.

Your Honor, $171.79 per week is the rate.

JUDGE GERAGHTY: Now, I have not had an opportunity to see the document you are referring to, Mr. Gucciardo, and I don't believe that it is possibly the same memorandum that I have.

Would counsel come to the bench so that we are sure, since this is going to be the basis of the stipulations.

Off the record.

(Discussion off the record.)

JUDGE GERAGHTY: On the record.

MR. GUCCIARDO: Your Honor, respondent and claimant jointly offer for your consideration as part of the evidence, the memorandum of conference dated May 20th, 1974, by John M. [6] Gontaryk, as well as the referral of claim to formal hearing also signed by John M. Gontaryk, Claims Examiner, for the U.S. Department of Labor.

Both exhibits are to be considered as a joint exhibit by claimant and respondent, the sole issue to be tried, as I said before, is jurisdiction.

JUDGE GERAGHTY: Mr. Linden, is that agreeable with you?

MR. LINDEN: That is correct.

Of course neither of us stipulate that the conclusions arrived at as to the jurisdiction set forth in the memorandum that has just been submitted are to be conceded by either side and further that the only claim is for the period of disability as indicated in the memorandum which is January 9, 1974, through April 15, 1974, inclusive, less two days' work.

In all respects, I believe that the memorandum is correct.

JUDGE GERAGHTY: The memorandums will be accepted as Joint Exhibits, limited to the facts and not the conclusions of the Hearing Examiner or Claims Examiner, whatever his title is, and the first typewritten document will be marked as Joint Exhibit 1.

The two-page exhibit will be marked as Joint Exhibit 2 for purposes of identification.

[7] (Whereupon, the documents above referred to were marked as Joint Exhibit No. 1 and Joint Exhibit No. 2 for identification.)

JUDGE GERAGHTY: While we are on exhibits, are there any other exhibits that either side wishes to offer?

Maybe we could dispose of all the exhibits at this point.

Do you have any, Mr. Linden?

MR. LINDEN: No, sir.

MR. GUCCIARDO: No, Your Honor.

JUDGE GERAGHTY: Are there any opening statements that either side wishes to make with respect to the issue and which I take it is jurisdictional?

MR. GUCCIARDO: I will waive opening statement, Your Honor, and reserve my statement for the closing statement.

MR. LINDEN: I would rather make closing statements.

JUDGE GERAGHTY: Do you have any witnesses, Mr. Gucciardo?

MR. GUCCIARDO: Yes.

I have the claimant.

JUDGE GERAGHTY: Would you call him?

MR. GUCCIARDO: Mr. Carmelo Blundo.

Whereupon,

CARMELO BLUNDO

[8] was called as a witness, and after having been first duly sworn by the Administrative Law Judge, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GUCCIARDO:

Q Mr. Blundo, would you please give your name and address for the record?

A Carmelo Blundo, 839 49th Street, Brooklyn.

Q Mr. Blundo, what is your occupation?

A Checker.

Q How long have you been checker?

A Five years.

Q Do you regularly work as a checker for a particular employer?

A Yes, sir.

Q What employer?

A ITO.

Q Will you tell us for the record where you perform your duties as a checker?

A 21st Street. Mostly on 21st Street.

Q Where is 23rd Street located?

A Excuse me?

JUDGE GERAGHTY: Excuse me.

The witness is saying 21st Street and you are saying 23rd Street.

[9] THE WITNESS: 21st.

MR. GUCCIARDO: I stand corrected, I am sorry.

THE WITNESS: I work on 21st Street, which occupies 21st Street up to 19th Street.

BY MR. GUCCIARDO:

Q Is there a gate maintained in order to go into this pier area?

A Yes, there is two gates, one on 20th Street and one on 19th Street.

JUDGE GERAGHTY: Mr. Gucciardo, I don't want to interrupt, I know you are totally familiar with the area, and I am little bit because of prior hearings, but the man has only stated that he works on 21st Street, which anybody reading the record would take as just a block in the middle of the city, maybe, and I am sure you mean it as a pier.

MR. LINDEN: And I think he also said 19th to 21st Street, which is correct.

MR. GUCCIARDO: I am going to get to that, Your Honor, the gate and enclosure and so forth.

BY MR. GUCCIARDO:

Q Is there a gate maintained to these premises known as 21st Street?

A Yes, there is.

Q There is a fence around the area, too?

A There is.

[10] Q What is this, actually, 21st Street. You said you work at 21st Street, but what kind of facility?

A It is a pier.

Q Is it adjacent to navigable waters of the United States?

A Yes, it is.

Q From the entrance or the gate to the water's edge, how many feet would you say that is?

A Well, coming in from 21st Street, I would say it is about a block and a half, two blocks.

Q Could we have an idea what type of a block you are talking about?

A A long block.

Q But feetwise, could you tell us? One hundred feet? Two hundred feet?

A I estimate a block to be approximately about five hundred feet.

I would say it is about seven hundred, eight hundred feet.

Q So, in other words, from the main gate to the water's edge is about seven hundred feet?

A Right.

Q How wide is it or how long running along the waterfront?

A It extends from 21st Street over to 19th Street.

[11] Q How many feet is that as best you can give us?

A I would say approximately about another thousand feet.

Q So the whole area would measure one thousand feet by seven hundred feet?

A I would say that.

Q Is this entire area one thousand by seven hundred feet approximately enclosed?

A It is enclosed.

Q It has two gates that you previously testified to?

A Right.

MR. LINDEN: We so concede.

MR. GUCCIARDO: I know.

That is why I am leading him, Mr. Linden, to save some time.

BY MR. GUCCIARDO:

Q Is there a guard maintained at these gates?

A At both of them.

Q Who are the guards?

A They are McRobert guards.

Q Who engages the McRobert guards as far as you know?

A ITO.

Q You mean the International Terminal Operating Company, Inc.?

A Right.

[12] Q Do you work for the International Terminal Operating Company, Inc.?

A Yes.

Q What is the business of the International Terminal Operating Company, Inc.?

A To receive—

MR. LINDEN: I object, unless he shows foundation to show that he knows.

JUDGE GERAGHTY: Ask the foundation.

BY MR. GUCCIARDO:

Q How long have you worked for—I will abbreviate it for the record, ITO?

A Five years.

Q In what capacity have you worked?

A As a checker.

Q Do you know what business they are in?
A Yes, I do.
Q What is their business?
A For discharging and loading cargo.
Q On where?
A Onto ships.
Q How many ships can be accommodated at this facility at 21st Street, pier of 21st Street?
A Approximately five.
Q Five ships?
[13] By the way, this is in Brooklyn?
A Yes, sir.
Q Does ITO engage a longshoreman to work both on the vessels and on the dock?
A Yes.
Q Is the sole business conducted at this facility, pier 21st Street, Brooklyn, the loading and unloading of vessels?
MR. LINDEN: I object to that as leading. Nor is there any foundation that he knows it.
JUDGE GERAGHTY: That is true, Mr. Gucciardo.
MR. GUCCIARDO: All right.

BY MR. GUCCIARDO:

Q You said you worked for ITO for approximately five years.
Where have you done this work?
A Mostly on 21st Street.
Q Do you know what business they are engaged in at 21st Street?
A Yes, I do.
Q What is the business that they are engaged in?
A They are in the business of loading and—of delivering and receiving of cargo.
Q In conjunction with what?
A With loading and discharging vessels.

[14] Q Are they engaged in any other business as far as you know, at that particular facility, pier 21st Street, Brooklyn, New York?
A Yes.
They were engaged in stripping containers for American Export Lines.
Q For the record, what does stripping containers mean?
A That means unloading containers that come off a ship.
JUDGE GERAGHTY: Just to be clear on it, you did say were engaged?
THE WITNESS: Yes.
The facility has moved to a different pier.
JUDGE GERAGHTY: I want to be sure that you said in the past tense, thank you.

BY MR. GUCCIARDO:

Q Now, do you know exactly what you are going to do every day before you do it?
A No, I don't.
Q Will you describe for us how the work is assigned and where it is assigned?
A Well, the dock boss assigns us in the morning.
Either he assigns us to delivering freight or receiving freight—rather delivering cargo or receiving [15] cargo from, for loading or discharging of ships.
Q Do you have occasion to go on the ships in your capacity as a checker?
A Yes, I do.
Q What percentage of your time is engaged in checking on board vessels as opposed to working on the dock?
MR. LINDEN: I object.
The issue here is what was he doing at the time that he was injured.
MR. GUCCIARDO: Your Honor, it is my contention that the activities generally of this claimant and what he is expected to be engaged in is important and not the

particular assignment that he may have had on a particular day.

JUDGE GERAGHTY: There is a recent decision down from the Benefits Review Board which you gentlemen may not have heard of yet.

I believe it is Coppollino, I am not sure how the name is pronounced, which involved paper into an IBM machine.

Are you gentlemen familiar with that?

MR. GUCCIARDO: I am familiar with that, but not the decision, Your Honor.

JUDGE GERAGHTY: The Board has held that that was a covered maritime, without getting into the merits of the lógic of the Benefits Review Board.

Nonetheless, in light of that decision, I feel that [16] the record should be allowed to be made, although I indicate my reluctance to do so.

I am aware of the decisions in other courts in which they have said, Mr. Linden, it is the duties at the time of the injury, not what he did two weeks ago.

MR. LINDEN: Even in Coppollino, what they did was examine what he was doing at the time he was injured.

This question is not devoted to that.

JUDGE GERAGHTY: I think it is more in the nature of a foundation question, am I correct, Mr. Gucciardo?

MR. GUCCIARDO: It is a little bit more than that, Your Honor.

It is my contention that all of the activities that this man is expected to be engaged in should be weighed in evaluating whether or not this man is engaged in longshore activity and not a particular activity at a particular time.

I realize that some of the Administrative Law Judges do not go along with that thinking.

However, I should be permitted to develop the record for purposes of appeal if an appeal should be warranted pending on your decision.

JUDGE GERAGHTY: I don't agree with your reasoning, Mr. Gucciardo.

However, I would allow you to make proffer for the record and take the answer to your question with the understanding [17] that I am doing it solely as a proffer and sustain Mr. Linden's objection, if that is the purpose of your question.

MR. GUCCIARDO: Then, will you permit him to answer the question?

JUDGE GERAGHTY: Yes, sir, I certainly would.

Would you answer the question or we will read it back.

THE WITNESS: Well, whenever I am assigned to a ship, I spend approximately eight hours a day.

As a matter of fact, I do spend eight hours a day checking.

BY MR. GUCCIARDO:

Q My question was, Mr. Blundo: In the course of a year's time, while working for ITO as a checker, what percentage of your time will be spent on board a vessel as opposed to working on the dock?

A It varies.

It varies to whenever he assigns me to a ship as a ship's checker.

Q But you have past experience of working on the ship as a checker?

A Yes.

Q Could you give us a percentage of the time?

A I would say approximately 20 percent of the time.

Q That you work where?

[18] A On the ship.

Q Thank you.

Now, during the course of the day, are you assigned to one particular task, or do you finish a task and then are reassigned and reassigned as the case may be?

A No.

When I am assigned to a ship, I stay with that there until the loading and discharging of cargo is finished.

Q All right.

Let us now go to when you are assigned on the—to work on the pier.

Do you work at a particular task or particular van all day long, or are you shifted?

A I am shifted around.

Q When you say you are shifted, on the day in question, you were injured discharging a container or a van?

A Right.

Q For the record, is a van and container considered the same thing?

A Yes, it is.

Q Now, assuming that you had not had the accident and you finished discharging that van, what other types of work would you be expected to do?

MR. LINDEN: I object.

He has not indicated a different type of work.

[19] He may be assigned to a different container.

MR. GUCCIARDO: I agree with your exception and withdraw it.

BY MR. GUCCIARDO:

Q What else would you be expected to do when you finished the van, assuming that you reported to the hatch boss—

JUDGE GERAGHTY: Mr. Gucciardo, are you still in your proffer now because I would like to get to the day in question.

MR. GUCCIARDO: One more question now, Your Honor.

THE WITNESS: When we finish unloading the container, we go on to another container.

If not, he will assign us to another task.

MR. GUCCIARDO: All right.

JUDGE GERAGHTY: Does that finish your proffer of general activities, Mr. Gucciardo?

MR. GUCCIARDO: Yes, Your Honor.

BY MR. GUCCIARDO:

Q You were injured on January 8th, 1974, is that correct?

A Yes, sir.

Q Will you tell us physically where you were located at the time of your injury?

A I was located on the 19th Street side of the pier.

[20] Q How far from the water's edge were you working at the time?

A Approximately thirty feet, forty feet.

Q What were you doing?

A We were unloading a container?

Q What was to be done with the goods that had been unloaded from this container?

A It was to be put in a bonded warehouse on the pier.

Q Then, what was to be done with these goods?

A Then, as these here cargo were assigned to a consignee, and they would come down to pick it up from Customs, it had to be released and they would have to be paid from Customs.

Q When you say Customs, what do you mean by Customs?

A U. S. Customs.

Q Are these men employed by the U. S. government?

A Yes, sir.

Q Do they have to do with checking the cargo that is received from overseas or from any—

A Well, checking and also receiving duty on it and payment for the cargo received.

Q Is there a particular type of facility that this type of cargo has to be put in before it is delivered to the consignee?

A Yes.

[21] It has to be put in a bonded warehouse.

Q Do you know where this container came from that you were discharging?

A It came from either Holland Hook or our facility out in Jersey.

MR. LINDEN: I didn't hear the last part.

THE WITNESS: A facility out in Jersey.

One of the piers out in Jersey.

MR. LINDEN: I object to the question on the grounds that he does not know where it came from.

He is stating where it may have come from.

JUDGE GERAGHTY: It does not appear that he really knows of his own knowledge, Mr. Gucciardo.

I would sustain that.

BY MR. GUCCIARDO:

Q Regardless of where it came from, do you know the stevedoring company that unloaded it?

A Right.

Q What is it?

MR. LINDEN: May I object to that unless he asks unloaded from where?

MR. GUCCIARDO: All right.

MR. LINDEN: Is he unloading the container or taking the container off a ship?

JUDGE GERAGHTY: I think if you will address that [22] question specifically.

MR. GUCCIARDO: I understand what he is driving at.

I will withdraw it.

BY MR. GUCCIARDO:

Q Do you, of your own knowledge, know whether this particular container that you were working on had been unloaded from a vessel?

A Yes.

Q Did you have papers in your possession identifying it to a vessel?

A Yes, sir, I did.

Q Do you know who, what stevedoring company rather, had unloaded it from the vessel?

A No.

That I don't know, but when it comes down to the pier, it is in the hands of ITO.

Q Does ITO have operations in Staten Island and New Jersey, as far as you know?

MR. LINDEN: I object.

Immaterial to the issues in this case.

JUDGE GERAGHTY: What is the relevancy?

MR. GUCCIARDO: I am trying to tie up the fact that ITO unloaded this cargo wherever it had been unloaded. His own employer.

JUDGE GERAGHTY: I think he has already said it was [23] in the hands of ITO but beyond that he doesn't know, of his own knowledge, based on the prior question, as to where the cargo came from, so I don't see how he could possibly answer that, Mr. Gucciardo.

BY MR. GUCCIARDO:

Q Do you know why the cargo was brought to 21st Street pier for the purposes of stripping it from the container?

A It is to be put in a bonded warehouse.

Q Couldn't that be done wherever it was unloaded from the vessel?

A I guess they didn't have the bonded warehouse on the facility.

MR. LINDEN: I object and ask that it be stricken.

He wasn't asked to guess.

BY MR. GUCCIARDO:

Q Do you know why, rather than guess?
Don't use the word "guess."

A They didn't have U. S. Customs facility on there to store this cargo.

Q Does all the cargo have to be put in a bonded warehouse before it is delivered to the consignee?

A To my knowledge, only container cargo has to be put into bonded warehouses.

Q Do you know why that has to be done?

A Because—

[24] JUDGE GERAGHTY: Excuse me, Mr. Blundo.

We have gone through that two or three times with the bonded cargo and consignee and U. S. Customs.

I don't think that we have to do it again unless you really feel that you need that for your record.

MR. GUCCIARDO: No, we'll pass over that.

BY MR. GUCCIARDO:

Q Now, after it is, the container is stripped, and it is put into the bonded warehouse, what occurs, what happens to that cargo?

A The consignee comes down to pick it up and pay duty on it.

Q And after the duty is paid, what happens?

A Then it is loaded on a truck and taken off the pier.

Q Who does the loading onto the truck?

A Longshoremen.

Q Who do the longshoremen work for?

A ITO.

Q Where is the truck physically located in relation to the pier that you described?

A Right on the pier.

Q Does he have to go through the gate that is maintained by the McRobert guards that you testified to before?

A Right, yes.

Q Now, is this the usual procedure that is followed in [25] unloading the bonded merchandise or bonded cargo from a vessel?

A Right.

MR. LINDEN: I object to that.

He hasn't indicated that he knows what the usual procedure is.

All he is doing is unloading a container.

JUDGE GERAGHTY: I think you could get the same answer by just turning the question around.

MR. GUCCIARDO: I will.

BY MR. GUCCIARDO:

Q Mr. Blundo, you said you were a checker?

A Yes, sir.

Q Do you, of your own knowledge, know what the procedure is in releasing bonded cargo to consignee?

A Yes, I do.

Q What is the usual procedure?

A Well—

JUDGE GERAGHTY: Well, without going through it in detail, is the usual procedure what you have already described, Mr. Blundo?

THE WITNESS: Somewhat like.

JUDGE GERAGHTY: What do you mean, somewhat like?

THE WITNESS: Well, before I can release cargo to a truckdriver, it has to be released to—by Customs, themselves.

[26] JUDGE GERAGHTY: So you need the release from Customs before it can be released to the consignee?

THE WITNESS: Right, to be cleared through Customs.

JUDGE GERAGHTY: I think we have gone through it two or three times.

MR. GUCCIARDO: I am going to get to the accident now.

BY MR. GUCCIARDO:

Q Will you tell us briefly how the accident occurred?

A Well, the cargo was coming off the container and I was going around to mark the draft.

There was ice on the ground and I slipped on the ice, hit my back and my head on the ground.

Q You used the word "draft," and what does that mean, please?

A The draft is a pallet containing the cargo.

Q Does the cargo on the pallet have markings on it?

A Yes, it has, and I go to give it a marking that they give me to put on it, with crayons.

According to my manifest sheet.

MR. GUCCIARDO: I have nothing further.

JUDGE GERAGHTY: Mr. Linden?

CROSS-EXAMINATION

BY MR. LINDEN:

Q I believe you came to the area where you were working [27] that is enclosed in this fence, it is approximately seven hundred feet from the water and extends about one thousand feet along the water?

A Right.

Q When the ships come in, when the ships come into this area, it comes in and is berthed parallel to the land, is that correct?

A To the pier.

Q Well, the pier is parallel to the land, isn't it?

A Well—

MR. GUCCIARDO: I am going to object to the question unless we get the type of pier, whether it is a finger pier or bulkhead pier.

JUDGE GERAGHTY: Be a little more specific, Mr. Linden.

MR. LINDEN: Well, I think when he answers the question, we will find out whether it sticks out in the water or is out by the land.

JUDGE GERAGHTY: Do you understand the question, Mr. Blundo?

THE WITNESS: Yes, it is a finger pier.

BY MR. LINDEN:

Q It sticks out into the water?

A Right.

Q Were you working on the portion that was over the [28] water or the portion that was over the land?

A Over the portion over the water.

Q You state that the area is one thousand feet along the water and that the ships pull in parallel to the land, is that right?

MR. GUCCIARDO: Objection, Your Honor.

He did not state that they pull in parallel to the land.

JUDGE GERAGHTY: This is cross-examination, Mr. Gucciardo.

I am going to let Mr. Linden—he indicated that the ships pulled in there and I think this is a reasonable construction of the prior testimony.

If the witness agrees or disagrees he can state whether or not he does.

BY MR. LINDEN:

Q The ships pull in parallel to the land, you told us, didn't you?

A That is before you explained to me about a finger pier.

Q I didn't explain anything to you.

I merely asked you a question.

A Well, it is parallel to the pier.

Q It is not parallel to the land?

A No.

[29] Q The nose of the ship is pointed toward the land, is that what you are telling us?

A Right.

Q Now, you say that you are familiar with the business of ITO at this location?

A Yes.

Q You told us, according to an answer of Mr. Gucciardo, that they were loading and unloading ships?

A Right.

Q Now, you also made mention of the fact that they were engaged, were your words, in stripping containers for American Export Lines?

A Yes, sir.

Q At the time of your injury, that is exactly what they were engaged in, is that true?

A Right.

Q You were engaged in checking cargo that was being taken from a container for American Export Lines, is that right?

A Right.

Q Now, that container was not unloaded from the ship that had berthed in this area, was it?

A No.

Q How did that container get to ITO's area, we will call it ITO's area, meaning the seven hundred by one thousand [30] foot area.

How did it get over there?

A It was brought over by Murphy truckdriver.

Q Who?

A Murphy Trucking.

Q What is Murphy Trucking; is it a public carrier?

A I guess so.

Q The truckdriver is ILA members or members of the Teamsters Union?

A Teamsters.

Q Truckdrivers are not in the employ of ITO, are they?

A No, they are not.

Q Do you know who pays the trucking concern to bring these containers over to this area?

MR. GUCCIARDO: Objection, Your Honor.

It is immaterial to the issues.

As long as they are not employed by ITO, what difference does it make who pays them?

JUDGE GERAGHTY: I will let him, as long as it is cross.

Who pays them?

BY MR. LINDEN:

Q Do you know who pays these men?

A I suppose if John Murphy hires them, John Murphy pays them.

[31] Q Do you know who pays Murphy for transporting the containers?

A I guess—whoever picks up the—

MR. GUCCIARDO: Your Honor—

JUDGE GERAGHTY: It is apparent that the witness does not know.

He is suggesting, Mr. Linden.

MR. LINDEN: Well, Judge Geraghty, this is, of course—also goes to the weight of the allegation that he knows the business.

JUDGE GERAGHTY: The business that he was talking about was the longshoring activities, not the business outside the gate or how cargo, who pays for it there.

I drew the distinction.

MR. LINDEN: Is that conceded so then I can depart from this particular area of cross-examination?

This witness is not familiar with Murphy Trucking or anything to do with the container moving into this area.

JUDGE GERAGHTY: I can't concede anything.

MR. LINDEN: I am asking if Mr. Gucciardo will concede that.

MR. GUCCIARDO: I am not conceding anything.

Just that this man does not know anything about the Murphy Trucking.

BY MR. LINDEN:

[32] Q You are not familiar with the contractual relationships between ITO, American Export Lines or the trucking company as to who is obligated to do what as far as getting containers to this area, are you?

A One thing I do know is that the containers come off the ship—

Q I know you are quite interested in establishing that, but I would like you to please answer my question, if you will.

MR. GUCCIARDO: Object to counsel arguing with the witness, Your Honor.

JUDGE GERAGHTY: You are arguing, Mr. Linden.

But the counsel is correct in that you are not answering the question as posed.

When you are asked the question, Mr. Blundo, answer the question as put to you.

If you don't know the answer, then say that you don't know it.

Do you understand what I am telling you?

THE WITNESS: Yes, sir.

JUDGE GERAGHTY: Now, let me hear what you want to say.

THE WITNESS: As far as the operations on the pier, I am well familiar with them.

JUDGE GERAGHTY: Fine.

Now, if he asks you a question about that, then you [33] try and answer the question that Mr. Linden asks you and the answer you were giving was really not responsive.

You have to respond to that question, not what you want to say.

Reask the question, Mr. Linden, and if you don't know the answer, you just say that you don't know.

THE WITNESS: Can I point out one fact?

I see the containers and—now as far as Murphy is concerned, we are only interested in what comes in on them and we do the work for ITO as stripping containers.

JUDGE GERAGHTY: Okay.

Thank you, Mr. Blundo.

BY MR. LINDEN:

Q The answer to my questions is: You are not familiar with the contractual relationships whereby ITO does work for American Export Lines or Murphy does work for whoever, and brings the containers into this area, are you?

JUDGE GERAGHTY: Mr. Blundo, do you know what contractual relationships means?

THE WITNESS: No, I don't.

JUDGE GERAGHTY: What he is asking you is: Do you know what kind of agreement, paper, contract, is signed between ITO and anybody else?

THE WITNESS: No, that I don't.

It is none of my business.

[34] JUDGE GERAGHTY: Is that enough?

MR. LINDEN: Yes, it is.

Thank you.

BY MR. LINDEN:

Q Now, you also indicated originally, generally, that ITO is engaged in the business of unloading and loading ships, is that what you told us?

A Yes.

Q The work that you were doing was not the loading or the unloading of a ship, you were just either loading or unloading a container?

MR. GUCCIARDO: Objection, Your Honor.

This is a determination that has to be made by you.

MR. LINDEN: I am talking about the physical movement of the cargo.

JUDGE GERAGHTY: Objection overruled, Mr. Gucciardo.

He is asking the question in a proper form.

He is asking at the time of the accident, was he loading or unloading a ship or was he loading or unloading a container.

That, I think, is a proper question, Mr. Gucciardo.

MR. GUCCIARDO: The Benefits Review Board has already ruled that the process of unloading does not stop at the stringpiece; that the container is unloaded and then it has to be delivered to the consignee and that includes an entire [35] process.

There has already been a determination made along those lines.

JUDGE GERAGHTY: I realize what the determinations have been with respect to that, Mr. Gucciardo, but that does not prevent Mr. Linden from asking the man what he was doing at the time of his injury, loading or unloading a ship, or loading or unloading a container.

What further ramifications flow from that as a matter of law is a wholly different story.

BY MR. LINDEN:

Q The question is: That you were not taking, checking cargo from a ship that was berthed there or put on there, you were checking cargo that was being taken out of the container that was located at this building, is that correct?

A Yes.

Q Now, it is also true that you do not know who took the particular container off the ship wherever it was taken off, and put it on the land, do you?

A Will you repeat that again, please?

Q Yes.

You do not know who, what company, what person, took the container upon which you were working at the time you were injured, from the ship, wherever it was, and put it physically on the land?

A Well, if the container come from Holland Hook, it [36] was taken off by American Export Lines.

Q But you don't even know that.

You don't know where it came from specifically, do you?

A Well, the paper is on it.

I have to know what is on the papers and the papers clearly explain American Export Lines.

The ship belongs to American Export Lines.

Q Are you generalizing as to who actually took this container from what ship or don't you recall?

A Well, I don't recall the name of the ship that it came off of.

But I know that the container came off the ship.

Q No question about that.

But my only question to you was, you don't know?

A It could be any one of a number of ships.

It could be the Defiance, the Lightning.

JUDGE GERAGHTY: Wait a second, Mr. Blundo.

What you are saying, just so we don't get the record confused—Mr. Linden is asking you what gang of longshoremen took it off the ship?

THE WITNESS: No, I don't.

BY MR. LINDEN:

Q Do you know how long before you started working on this container it had been removed from the ship?

[37] A Approximately the same date or the day after.

Q Do you know.

A No, I don't.

Q Is it true, sir, that sometimes a container is removed from a ship at a distant point? It might take

several days before it will get to the area before it is unloaded?

A Not to my knowledge.

Q You don't know, do you?

A No.

MR. LINDEN: I don't think I have anything else.

MR. GUCCIARDO: I have one or two.

REDIRECT EXAMINATION

BY MR. GUCCIARDO:

Q What is the usual period of time from the time a container is unloaded from a vessel up to the time that it is actually delivered to the consignee.

MR. LINDEN: I object on the grounds that there is no showing that this claimant knows any of this.

JUDGE GERAGHTY: You are going to have to ask a foundation question, then, Mr. Gucciardo.

MR. GUCCIARDO: I will correct that.

BY MR. GUCCIARDO:

Q Do you know of your own knowledge what the procedure is between the time a container is taken off the vessel and delivered to the consignee and how long it takes?

[38] A Well, it has to come over to the pier to be stripped and that there could take a week.

Q Is this the usual procedure?

MR. LINDEN: I object, the question has been answered.

JUDGE GERAGHTY: I think I will allow one more question.

He has given the procedure, now Mr. Gucciardo is asking, is this the general procedure.

THE WITNESS: Generally, when it comes down to the pier, stripped—

BY MR. GUCCIARDO:

Q Just answer the question.

Is this the usual procedure?

A Yes, it is.

Q Did you follow the usual procedure in this particular case?

A Yes, I did.

Q Now, you mentioned Murphy Trucking or John Murphy Trucking.

Are you paid in any form or fashion by John Murphy Trucking?

A No.

Q Are you paid by the American Export Lines?

A No.

[39] Q When the container is actually unloaded from a vessel, it's done by American Export Lines or stevedoring company that works for them?

MR. LINDEN: I object, the witness has indicated that he does not know.

MR. GUCCIARDO: I am sorry.

He did not indicate this particular phase of it.

JUDGE GERAGHTY: He has not made any response to this particular question, Mr. Linden.

THE WITNESS: It is being done by ITO.

BY MR. GUCCIARDO:

Q So that the cargo in question was unloaded somewhere by ITO?

A Right.

JUDGE GERAGHTY: Mr. Linden, you look—he said it is unloaded by ITO.

MR. LINDEN: I understand what he said.

BY MR. GUCCIARDO:

Q Would ITO be engaged in unloading a container from Pittston Stevedoring Company or Universal Stevedoring Company?

A It is.

MR. LINDEN: I object.

The witness said he doesn't know.

MR. GUCCIARDO: I join in the objection and move that the answer be stricken from the record.

[40] JUDGE GERAGHTY: That takes care of that, Mr. Linden.

BY MR. GUCCIARDO:

Q Of your own knowledge, do you know that ITO has stevedoring facilities located in New Jersey as well as the New York area?

MR. LINDEN: That is conceded and it is immaterial to the issues here.

MR. GUCCIARDO: As long as it is conceded, fine. I have nothing further.

RECROSS-EXAMINATION

BY MR. LINDEN:

Q You told us a little while ago that you did not know who actually took the container from whatever ship it had been on when it was shipped into this country?

MR. GUCCIARDO: Objection, Your Honor.

What he stated was that he did not know the gang that did it.

Not that he did not know who did it, what company did it.

I object to the form of the question.

MR. LINDEN: I submit my question is based on the record.

JUDGE GERAGHTY: I would agree with Mr. Gucciardo.

He indicated that he did not know what gang.

He did not reflect what company and I think the [41] question as was asked before was extremely narrow.

MR. LINDEN: All right.

BY MR. LINDEN:

Q Do you know what company was employed to remove the particular container which you were working on when you were hurt, from whatever ship it had been on, transporting this container into the United States?

A No.

MR. LINDEN: That is all.

JUDGE GERAGHTY: Mr. Gucciardo, do you have anything?

REDIRECT EXAMINATION (Continued)

BY MR. GUCCIARDO:

Q Do you know what stevedoring company had unloaded it from the vessel?

MR. LINDEN: I object.

The question has been answered.

He is leading him into a different answer.

MR. GUCCIARDO: No.

It isn't, Your Honor.

His question was too ambiguous for a direct answer.

MR. LINDEN: Not only ambiguous but all inclusive.

JUDGE GERAGHTY: I will agree with Mr. Gucciardo.

You may answer it.

BY MR. GUCCIARDO:

[42] Q Do you know what stevedoring company had unloaded this container?

A No, I don't.

Q Now, do you know this gentleman sitting in the hearing room?

A No, I don't.

MR. GUCCIARDO: All right.

I have nothing further.

JUDGE GERAGHTY: Mr. Blundo, let me ask you a couple of questions.

Now, on the day of your accident, you were working on the pier inside of a building that goes out over the water, is that correct?

THE WITNESS: No.

JUDGE GERAGHTY: My notes indicated that you were working on a portion that stuck out over the water.

THE WITNESS: Yes, on the stringpiece.

JUDGE GERAGHTY: You were working on the stringpiece.

You were not outside the building, you were inside the building?

THE WITNESS: That is right.

JUDGE GERAGHTY: And you were engaged as a checker in the stripping of a van?

THE WITNESS: Yes.

JUDGE GERAGHTY: And is a van equal to a container, [43] do the words mean the same thing?

THE WITNESS: Yes, sir.

JUDGE GERAGHTY: And the container belonged to who?

THE WITNESS: American Export Line.

JUDGE GERAGHTY: The work was being done by ITO?

THE WITNESS: Yes, sir.

JUDGE GERAGHTY: With the longshoremen stripping the container—who were they employed by?

THE WITNESS: ITO.

JUDGE GERAGHTY: Did you have papers in your hands?

THE WITNESS: Manifest sheet.

JUDGE GERAGHTY: What was shown on those papers?

THE WITNESS: The description of the cargo and the consignee and the amount.

JUDGE GERAGHTY: Did it show where the container had come from?

THE WITNESS: Yes, it does.

JUDGE GERAGHTY: Do you remember, of your own knowledge right this moment where?

THE WITNESS: No, because that was the first or second draft that it had come out of.

JUDGE GERAGHTY: When you said it took a week to do something, was that the week for the cargo after it comes out of the container before it gets in the hands of the consignee, or is it a week possibly between the time the container comes [44] off the ship until it gets to you?

THE WITNESS: It could be up to the time it comes to me.

JUDGE GERAGHTY: It could be as much as a week?

THE WITNESS: Yes.

JUDGE GERAGHTY: On this particular container, do you know how long it had been since it had come off the ship?

THE WITNESS: No, I don't.

JUDGE GERAGHTY: Had it been opened at any time prior to the time you started stripping?

THE WITNESS: No, they come in with a seal.

The seal has to be broken and shown to Customs.

JUDGE GERAGHTY: Your action is the first time that the container starts to be stripped or unloaded, the cargo from outside the van?

THE WITNESS: Right.

And we have to record the serial number and the seal, all that.

JUDGE GERAGHTY: Now, sir, I take it a draft, because this is new terminology to me, a draft is a portion of the cargo that is inside the container that is put on a pallet?

THE WITNESS: Yes.

JUDGE GERAGHTY: Is that correct?

THE WITNESS: That is right.

JUDGE GERAGHTY: That is what you were marking, a [45] portion of this cargo?

THE WITNESS: You see, the manifest sheet is given a number and an item number.

Now, it could be, let us say they assign a number 735, Item No. 1.

We have to mark that on the draft.

JUDGE GERAGHTY: And the draft could be maybe six bags on top of a pallet?

THE WITNESS: It could be six bags, it could be any amount.

JUDGE GERAGHTY: But that somes out of the container, put on a pallet and you mark that?

THE WITNESS: Right.

JUDGE GERAGHTY: That is what you were doing at the time you slipped and fell?

THE WITNESS: Right.

JUDGE GERAGHTY: Mr. Linden, did you have a question?

MR. LINDEN: If you are finished, yes.

JUDGE GERAGHTY: Thank you for educating me, Mr. Blundo.

RECROSS-EXAMINATION (Continued)

BY MR. LINDEN:

Q Mr. Blundo, you marked pieces of cargo that were removed from this container by your fellow longshoremen, is that right?

[46] A Right.

Q Now, were these—was the cargo that was taken out, did that consist of crates, bags, barrels, various sorts of containers holding merchandise inside each particular container, I mean, each particular package?

A It could be cartons, it could be crates, it could be bags, it could be almost anything.

Q You don't open up an individual crate that is part of the cargo, do you?

A No, we don't.

Q You are just concerned with the bulk outside appearance of the package in which the cargo has been placed by the shipper?

A No.

I am concerned with the marks on it.

Q I understand that, but it is only the crate itself, or the container, or the ball, that you are concerned with, and the marks on it?

A Right, not with the contents.

MR. LINDEN: Not with the contents.

That is all.

MR. GUCCIARDO: One or two questions, if I may.

REDIRECT EXAMINATION (Continued)

BY MR. GUCCIARDO:

Q This seal that you say you have to break on the [47] container in order to get in, where is it placed?

A The seal is broken.

We record the number on it.

Q Who seals it and where is it done?

A It is sealed on the other side, Europe, where the container comes from.

Q In a foreign port.

Then, are you the first person to break this seal after the container arrives in the United States?

A Right.

Q Does the container contain merchandise from one consignee or multiple consignees?

A Multiple consignees.

Q Is this the reason that the stuff has to be removed from the container and then separated for the various consignees?

A That is right.

Q You mentioned the word "stringpiece."

A Right.

Q Will you tell us what the word "stringpiece" is and what the function is?

A It is a piece that runs along the pier.

JUDGE GERAGHTY: I am familiar with that terminology, Mr. Gucciardo, thank you.

BY MR. GUCCIARDO:

Q Is there water under the stringpiece?

[48] A Yes.

MR. GUCCIARDO: I have nothing further, Your Honor.

JUDGE GERAGHTY: Thank you very much, Mr. Blundo.

Thank you for explaining that to me.

I did not understand the word you were using.

Mr. Linden, do you have a witness?

MR. LINDEN: I have a witness.

Mr. Cash.

Whereupon,

ALBERT W. CASH

was called as a witness, and after having been first duly sworn by the Administrative Law Judge, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LINDEN:

Q What is your name?

A Albert W. Cash, C-a-s-h, International Terminal Operating Company, 17 Battery Place, New York, New York, 10004.

Q Are you employed by ITO?

A Yes.

MR. LINDEN: May I use ITO, Judge Geraghty?

JUDGE GERAGHTY: Certainly.

THE WITNESS: Yes.

BY MR. LINDEN:

Q What is your capacity there?

A I am the Director of Safety for ITO.

[49] Q For how long have you been such Director?

A This assignment, fifteen years.

Q Are you familiar with the business of ITO at the location at 19th and 20th Streets on the Brooklyn waterfront where this claimant was working at the time of his injury?

A Yes, sir.

Q Do you know what he was doing at the time he was injured?

A According to the investigation of the accident, he was checking—

MR. GUCCIARDO: Objection, Your Honor.

The question is: Does he know?

He says according to the investigation, and I object to the answer and move that it be stricken.

JUDGE GERAGHTY: On the grounds of what?

MR. GUCCIARDO: That this is not within his knowledge.

JUDGE GERAGHTY: It does not appear from his knowledge that he has personal knowledge, Mr. Linden.

MR. LINDEN: First, let him answer whether he knows.

BY MR. LINDEN:

Q Do you know what he was doing at the time he was injured?

A Yes, sir.

Q How do you know?

[50] A As a result of an investigation of an accident concerning Mr. Blundo, he was working as a checker at a—

MR. GUCCIARDO: Objection, Your Honor.

The same grounds, it is not within his knowledge.

JUDGE GERAGHTY: Now, I am not clear whether or not it is.

Now, Mr. Cash, when you say according to an investigation, is it your investigation?

THE WITNESS: Yes, sir.

JUDGE GERAGHTY: You performed it?

THE WITNESS: Yes, sir.

JUDGE GERAGHTY: Or people working directly for you who reported back to you?

THE WITNESS: And people working directly for me.

JUDGE GERAGHTY: This is the usual course of the way things are done?

THE WITNESS: Yes, sir.

JUDGE GERAGHTY: Since this is an administrative proceeding, I am going to allow him to testify.

Since this is apparently what he does, Mr. Gucciardo.

However, it would go, of course, to the weight of the testimony, unless it is something that he personally knows himself.

So I would appreciate what you draw, Mr. Linden, as to whether it is one of his investigators reporting back to [51] to him or whether it is something that he found out himself.

MR. LINDEN: I intend to, Judge Geraghty.

JUDGE GERAGHTY: Thank you.

BY MR. LINDEN:

Q In the course of this investigation which you state was conducted by you and by other people, were there records that are kept by the company in the normal regular course of business in respect of the claimant's activities and also the manner in which he was injured?

A Yes, sir.

Q Did you consult those records?

A We have an accident report which contains all the information, the location of the accident, the man's position, or the type of work he was performing at the time of the accident, date, injury, things of that nature.

Q Are you familiar with the type of checking that he was doing in checking the contents of the container that was being unloaded when he was hurt?

A Yes, sir.

Q To whom did this container belong?

MR. GUCCIARDO: Objection, Your Honor.

No proof in the record that he knows which container it was or how he established this.

JUDGE GERAGHTY: I think he has already laid sufficient foundation because he has testified that he has [52] consulted the investigation reports and this contains all the information as to what was transpiring at the date, time and place of the accident, which Mr. Blundo was involved in, and without going into agonizing detail as to each item that he knows, may I just be clear, unless I am mistaken, is it your testimony, Mr. Cash, that this investigation report shows all the details with respect to what Mr. Blundo was doing at the time he was injured?

THE WITNESS: Yes, sir.

JUDGE GERAGHTY: On those grounds, your objection is overruled.

BY MR. LINDEN:

Q When was this investigation conducted, how along after the accident?

A I became involved in it, I believe, the day following the accident, sir.

The investigation was made on the day of the accident, prior to my arriving down there.

Q Were you able to identify the container on which the claimant had been working at the time his injury occurred?

A No, sir.

Q Were you able to identify generally to whom the container belonged?

A No, sir.

Q Do you know anything as to what happened to that [53] container after the claimant was injured?

A In the container?

Q Injure the container itself?

A No, sir, I do not.

Q At this location, is ITO engaged in taking cargo off ships or putting it on ships?

A At this—

Q At this location where the claimant was working on 19th Street.

A We do not use that pier, sir, that section of the pier which is the northeast side for loading or discharging from ships.

MR. GUCCIARDO: Objection, Your Honor.

The question was: At this pier, not the northeast side. The man is restricting the answer.

MR. LINDEN: He should restrict the answer because I asked him about the location where the claimant was working at 19th and 20th Streets.

JUDGE GERAGHTY: My understanding of the question, Mr. Gucciardo, he was asking specifically as to the place where the claimant was working, which he stated was the stringpiece at the 19th Street pier.

BY MR. LINDEN:

Q What operations are conducted by ITO at this [54] location where the claimant was injured; what were they doing there?

A Storage of various types of commodities, both ITO's and other parties, and also stripping and stuffing station which at that time we were operating for an outside contractor.

Q What outside contractor?

A American Export Lines.

Q The claimant has testified that this particular container had come from American Export Lines and was being unloaded for them.

Does ITO have anything to do with the movement of that container into your facility at 19th Street?

A No, sir.

Q Who brings the container into this area?

A A common carrier, sir.

Q Do you know who takes the containers on which you were working, or rather the claimant was working at the time he was injured, what company, or what instrumentality actually physically takes the container from the ship after it has arrived at wherever it is being unloaded?

A No, sir.

Q Has it anything to do with the conduct of your business in taking cargo out of the container for American Export Lines as to who, where or when this container was physically removed from the ship?

[55] A No, sir.

Q Who retains you, who retains ITO to remove cargo from a container, American Export Lines containers?

A American Export Lines.

Q Do you have—does ITO have anything whatsoever to do therefore with the loading or unloading, that is, the placing onto a ship or the removal from a ship of these containers in which you were engaged in checking cargo at the facility at 19th Street?

A No, sir.

Q Is it true that in other areas ITO and at another portion of this facility, ITO does load and unload ships?

A Yes, sir.

Q Is it correct, therefore, that ITO is engaged in several different operations, part of which concerns the loading and unloading of ships, part of which has to do with the placing of cargo into a container and the removing of cargo from a container?

A Yes, sir.

Q Is ITO also in the business of warehousing merchandise in this general facility area for future transshipment into other areas?

A Yes, sir.

Q Do you know from what ship the container from which the claimant was working had come?

A No, sir.

[56] Q Now, he has stated that a container could be at your facility up to a week before it was loaded or unloaded, is that correct?

A Would you repeat that?

Q Yes.

The claimant has told us that when a container is brought to the facility, that is, the container for emptying or filling by your people, for American Export Lines, that the container can stay there for a day or a week, is that correct?

A It could stay there considerably longer, sir.

Q What do you mean by considerably longer?

A It depends upon the expediting of the container by the agent for the American Export Line, whether or not it is required in a hurry up job or not.

We don't know. It can be there for a few days, a week, we don't know.

But they do try, according to the requirements that the contractor places on ITO, to get the container in and out.

Q Now, cargo that is placed in a container, and cargo that is taken from the container, is that marked in any fashion?

Is it in a crate or a barrel or a carton of some sort?

A It comes off various types of packages in the container. It might be one standard package throughout. It might [57] be one full load of, say, for example, bag cargo, drum cargo.

It could be almost anything, but when you break down a container that is less than a load, a full load, then it

will be a variety of types of cargo going to various companies or locations.

Q Now, you say that you use containers where the cargo that a shipper is sending out or going to receive less than a full load, you mean less than a full load to fill a container?

A For one person.

Q Are there some containers that—

A It is a consolidated unit.

MR. GUCCIARDO: Your Honor, I am going to object to this line of questioning on the basis of counsel's objection to my line of questioning.

We are concerned here with what the man was doing at a particular time.

Now, he is going into generalities, as to what containers contain, less than one carload. It is immaterial to the issues.

MR. LINDEN: May I point out that Mr. Gucciardo began to refer to decisions of the Benefits Review Board, in respect of the characterization as to what was being done and thereby determining whether this made it maritime employment or not.

[58] Our position is that you must, therefore, examine the character, nature of the activities in which he was engaged, in order ultimately to be able to determine whether the activities in which he was engaged constituted maritime admiralty material.

JUDGE GERAGHTY: I agree.

I don't need anymore, Mr. Gucciardo.

You recall, Mr. Linden, I allowed it only as a proffer for purposes of appeal.

I don't believe that it is relevant to the determination herein.

I will let you go on.

I think you developed it far enough.

If you have one or two more questions.

MR. LINDEN: I have one or two more questions and I intend to tie it into the legal concept on which we are basing our defense.

JUDGE GERAGHTY: With that offer, I will allow you to develop your record since it is some indication that there may be an appeal.

BY MR. LINDEN:

Q Are there some containers that are completely filled and destined for a particular consignee or that a shipped fills completely, that ITO does not handle at all at this facility?

[59] A Yes, house-to-house containers is one.

Going to one single consignee, we would not even bother with that.

You are talking stripping and stuffing of individual containers in order to remove or reconsolidate cargo.

Q All right.

Now, the claimant has told us that when he opens the seal on a container, that the longshoremen then remove the various crates, cartons, boxes, bags or whatever the cargo is contained in from the container, and places it in the warehouse for picking up by the consignee, is that correct?

A That happens, yes.

Q Is it also true that the individual crate that was part of the consolidated shipment in the container, an individual crate, is not opened by ITO?

MR. GUCCIARDO: Objection, Your Honor, to the form of the question.

Is it also true?

He has been using it time and time again.

I think it is now time that he be admonished that this is his witness and the question should be placed accordingly.

JUDGE GERAGHTY: He may have been doing it, but you have not been objecting up to this point.

MR. GUCCIARDO: Yes, because I knew what was going [60] to be elicited and it was not material.

But now we are going into an area that is material.

The fact that I did not object before does not mean that it was not objectionable.

JUDGE GERAGHTY: I did not mean that you were waiving it—

MR. LINDEN: Since there is an objection, I will rephrase it differently.

JUDGE GERAGHTY: Please do.

BY MR. LINDEN:

Q Mr. Cash, does ITO open up an individual crate in which cargo has been packed by a shipper?

A Only on direction of the Customs, an individual carton, they may have reason for it.

Q Normally, does ITO know whether there is one or several different items of cargo contained in a crate that is being received or sent out by a shipper?

MR. GUCCIARDO: Objection.

What is contained in a crate that is empty?

JUDGE GERAGHTY: I would agree.

I don't see whether it is relevant as to whether it is maritime employment or not.

MR. LINDEN: May I state where it is relevant, Judge Geraghty?

JUDGE GERAGHTY: Please do.

[61] MR. LINDEN: It is quite obvious that a container is like a big box, somebody takes a whole bunch of smaller crates and puts them in this big box and they are then sent someplace else.

A shipper similar can take a big crate and put five or six or ten items in that one crate.

The use of a container does not carry with it a necessity, the inference that because a container is used, it has assumed character of maritime or admiralty jurisdiction.

It is a big box.

Instead of sending a bunch of small boxes, they are sending a big box to send overseas.

Our contention is therefore in order for the Longshoremen and Harbor Workers' Compensation Act to apply to a particular occupation at a particular time, the occupation itself must be such that it has come out of the character of an area of States jurisdiction into the area of maritime jurisdiction, where the law will apply.

Now, in this case it is quite clear that ITO was not engaged in the loading or unloading of a ship.

All they were doing is unloading a box and emptying a box.

That is all.

That is the basis upon which we believe. The theoretical analysis of the application of the law, both as it [62] is written and as to its constitutionality must be approached.

JUDGE GERAGHTY: I understand why you are asking the question then, Mr. Linden.

Since that apparently is the theory of this case, without passing again on the merits of it, I will allow it just for development of the record.

Mr. Gucciardo, I realize you have taken the contrary position.

MR. GUCCIARDO: Just allow me to make one more remark.

I am not arguing with Your Honor, but he has stated that the shipper puts his in the container. It is put in by the stevedoring company wherever the vessel is—

JUDGE GERAGHTY: I don't take what either one of you gentlemen has said as evidence.

I take it as positions that you have assumed for purposes of your contentions.

MR. LINDEN: I guess that my direction wasn't clear, because obviously I intended to come to that point and

that is when Mr. Gucciardo, as I approached this area, Mr. Gucciardo objected.

JUDGE GERAGHTY: I understand.

Thank you, Mr. Linden.

Go ahead and finish your questions.

BY MR. LINDEN:

[63] Q Who puts whatever articles are contained in the crate for overseas shipment into that crate?

A The manufacturer or the people that are selling them to some, to whoever they sell them to.

For example, a crate of small parts for automobiles and crates—

MR. GUCCIARDO: I will concede that the crate is loaded by the manufacturer.

It is immaterial to the issues.

MR. LINDEN: Good. That is helpful.

MR. GUCCIARDO: But not the container.

JUDGE GERAGHTY: I understand the extent of your concession.

I understand your position, Mr. Linden.

MR. LINDEN: May I make one definition, though?

I think that the use of the word "container" should refer to the large van or container into which various items of cargo are consolidated, sealed and then placed on the ship as contrasted with a barrel or crate or carton or bag.

JUDGE GERAGHTY: I was following it that way, Mr. Linden.

I was assuming that we are still using the same definition.

MR. LINDEN: I was up to a second ago, and then I wanted to make sure.

[64] May the witness continue?

He started to say the manufacturer of automobile spare parts.

JUDGE GERAGHTY: I don't think we would have to go into it any further.

I would assume that ITO does not load every box or sack, especially if it is not a non-consolidated van.

They would be loaded by the coffee pickers or the ones who are making the automobile parts or whatever you might have, the oil drums.

MR. LINDEN: Can I also obtain a concession if we take the example that the witness referred to, we have a manufacturer of automobile parts who consolidates in the crates, which they assemble and send down to the shipper, that it is the consolidation of differing pieces of cargo that he is going to send to one particular destination?

MR. GUCCIARDO: The implication there is going a little too far.

The shipper puts it in a carton and they have multiple cartons. It is palletized by longshoremen and then put into a van depending on what port it is going to and how many consignees are delivering for that particular port.

I will stipulate to that.

JUDGE GERAGHTY: When you stipulate to that, is that the import?

[65] MR. LINDEN: Yes, but that is not quite as far as I wanted to go, nor does it answer what I asked which is: Are there crates into which a shipper consolidates several different types of parts and then closes that one crate and sends it down to the waterfront for shipment overseas?

JUDGE GERAGHTY: Mr. Cash, do you know that of your own knowledge, the answer to that question?

THE WITNESS: I didn't hear that last one.

Would you repeat it?

MR. LINDEN: The question is, Mr. Cash: Do you have a shipper who is a manufacturer of auto parts, do you know if a shipper of auto parts, takes a number of auto parts in a single crate, which is then shipped to a single consignee overseas?

THE WITNESS: Yes, sir.

MR. LINDEN: That is all.

JUDGE GERAGHTY: Is that it?

MR. LINDEN: Yes, sir.

JUDGE GERAGHTY: Do you have any cross?

CROSS-EXAMINATION

BY MR. GUCCIARDO:

Q Mr. Cash, as a Safety Director, actually you are concerned with all types of accidents that occur on the waterfront, is that right?

A Yes, sir.

[66] Q As a Safety Director, you keep records of all these accidents, is that correct?

A Yes.

Q Did you bring those records with you today?

A No, sir, I did not.

Q When did you consult them last?

A Quite some time ago.

Q How long ago?

A Are you referring specifically to Mr. Blundo's statement?

Q Mr. Blundo's statement.

When did you consult those records last?

A A few months ago is about the best I can say at the moment.

Q Would that be about three months and possibly six months?

A Yes, sir.

I review accidents, frequently at the end of the year.

Q And ITO has a great number of accidents, do they not?

A No, sir.

We don't have a great number of accidents.

Q How many accidents does ITO have in the course of the year?

MR. LINDEN: Objection, immaterial.

[67] MR. GUCCIARDO: I am testing his memory.

JUDGE GERAGHTY: I think I will allow it on cross since he said he reviews accidents, it might go to the weight of the accuracy of the investigation report.

Mr. Cash, go ahead and answer it.

Your best estimate.

THE WITNESS: The number of accidents, my best recollection as of right now, during the course of the year of 1974, we have had throughout ITO, which is a very large firm, somewhere in the vicinity of 778. I believe. Give or take a few, sir.

BY MR. GUCCIARDO:

Q 700 to 800 accidents, right?

A Accidents and/or incidents which were reported as accidents.

So we will put it as that way.

Q Would it be fair to state that every time you have an accident, the accident report comes in with the cargo that was involved and the ship it came from?

A It comes under the jurisdiction, it will have the name of the ship right on the report, sir.

Q Right.

A There is quite a bit of information.

Q Would it be fair to say, then, that since this cargo had been offloaded from the ship, if there was an [68] identity of the cargo involved with the accident, that the name of the ship involved or the name of the ship on which this cargo had been carried would be associated with the accident report?

A Of my personal knowledge, I don't know that that cargo was unloaded from the ship or what ship it may have been or when it was discharged. They were merely a freightway station where we were transferring or consolidating or stripping a container.

Q All right.

Now, does the ITO company conduct stevedoring activity for the American Export Lines?

A No, sir.

Q Do you consider that stuffing and unstuffing a container is not the business of stevedoring activities?

A No, sir.

MR. LINDEN: I object.

That is a legal question.

JUDGE GERAGHTY: Sustained on that grounds.

If you are asking for a legal conclusion.

Off the record.

(Discussion off the record.)

JUDGE GERAGHTY: Back on the record.

The interruption was for the changing of the paper in the court reporter's machine.

[69] BY MR. GUCCIARDO:

Q Are you familiar with the loading and unloading process that is required of a vessel in order to ship goods or to receive goods?

A Yes, sir.

Q Would it be fair to state, then, that in order to ship goods, that the cargo has to be received by the stevedoring company, it is then put in containers or vans and then placed on board a vessel?

MR. LINDEN: I object.

There are other alternatives also.

THE WITNESS: No, sir.

JUDGE GERAGHTY: Wait a second.

Your objection is that there are other ways, this is the only way of doing this?

MR. GUCCIARDO: We are involved with containers.

I have to concede that there are other ways, too.

MR. LINDEN: Then I have no objection.

JUDGE GERAGHTY: Mr. Cash, what you are being asked with respect to containerized cargo, is this a general way that a containerized cargo would be handled, if you know?

THE WITNESS: In general, this is one of many ways, yes.

BY MR. GUCCIARDO:

Q And similarly, when cargo is discharged from a [70] vessel, the container is removed from the vessel and then landed on the stringpiece and then put in some facility for the purposes of stripping the container, is that correct?

A Yes, sir.

Q Is the purpose for stripping a container to remove the various cargo that is contained therein, which is destined for miscellaneous consignees?

A In the case of a container which has various commodities to various consignees, it would be stripped, yes, sir.

Q And where the container has cargo destined for one consignee only, it would not be stripped, then, or would it?

A No, sir, it would not be stripped.

Q Then it would be directly given to the consignee?

A To the consignee going through the normal formality of clearance and everything else, yes, sir.

Q And in importing cargo from overseas, do they put a seal on the container?

MR. LINDEN: Who is they?

BY MR. GUCCIARDO:

Q Is a seal put on a container?

A We do put seals on containers, yes, sir.

I can't speak for everyone else.

Q Is that the way—

A It depends on the commodities within the container, [71] sir.

Q Is there certain merchandise that has to be put in a bonded warehouse until the consignee receives them?

A Depending on the Customs regulations, sir.

Q All right.

And is, if the Customs regulations required, is it then put in a bonded warehouse facility for the purposes of Customs, whatever it may be, to pay the duties?

A As designated by the Customs, sir.

Q When Customs clears it, is it then delivered to the consignee?

A Depending upon when the bonded warehouse is.

Q In this particular case, do you have a bonded warehouse at the pier at 21st Street in Brooklyn?

JUDGE GERAGHTY: If you know, Mr. Cash.

I don't know if we have a bonded warehouse on 21st Street, sir.

BY MR. GUCCIARDO:

Q Were you present when the claimant testified in this room this morning?

A Yes, sir.

Q Did you hear him testify that the goods had to go into a bonded warehouse?

A Yes, sir.

Q Do you have any reason to dispute that?

[72] A I will have to double check whether or not we are actually physically licensed as licensed bonded warehousemen at 21st Street.

Q At the present time you have no reason to dispute that, do you?

JUDGE GERAGHTY: What he is asking you, of your own knowledge right now, you don't know whether there is a bonded warehouse at 21st Street?

THE WITNESS: A formal bonded warehouse at 21st Street, I do not know of, sir.

BY MR. GUCCIARDO:

Q Okay.

Now, is it part of the normal unloading process before the consignee gets the goods, and now we are dealing with goods that have to be put in a bonded facility until

it is delivered to the consignee to unload the container from a vessel, then put it in a bonded warehouse and then deliver it to the consignee from that bonded warehouse, is that the normal procedure, sir?

A It is generally held on the pier in custody, not a bonded warehouse per se, sir.

In custody, not a bonded warehouse.

Q Is this in the custody of the stevedoring company then?

A Under the direction, yes, sir, under the direction [73] of the Customs, yes, sir.

Q If this were, in fact, a bonded warehouse, these goods would be in your custody at the pier until it is delivered to the consignee?

MR. LINDEN: Wait just a minute.

I think there are two questions there.

JUDGE GERAGHTY: Yes.

I think we are getting awfully far afield, Mr. Gucciardo.

I would trust that we are going to end this line of questioning.

MR GUCCIARDO: Your Honor, I don't think it is far afield at all.

I am trying to get into the usual practice of unloading as far as this gentleman knows, goods that are bonded and where it has to go and why it goes to a particular facility, and this is part and parcel of the unloading process.

JUDGE GERAGHTY: I think you have explored it two to three times now, Mr. Gucciardo.

That is why I wonder why you are going through it again with him, since he really doesn't know what goes on at 21st Street pier.

MR. GUCCIARDO: That is why my questions are in a general form.

Is the usual process of the unloading to put it in a [74] bonded facility, and then have Customs check it and then deliver it to the consignee?

Is that the usual procedure?

JUDGE GERAGHTY: Answer that question if you can, Mr. Cash.

THE WITNESS: I can't answer that question the way you have asked it.

You keep injecting bonded warehouse and I don't know if we have one.

BY MR. GUCCIARDO:

Q Assume that there is a bonded warehouse, is that the usual procedure?

MR. LINDEN: I object to the assumption.

We can very easily find out.

MR. GUCCIARDO: There was testimony that there was a bonded warehouse.

My man testified to that.

MR. LINDEN: No, he didn't.

JUDGE GERAGHTY: Wait, Mr. Linden.

I don't think the question is relevant as to a determination of Mr. Blundo's status at the time.

I realize that he has made reference to bonded material in his direct testimony this morning, Mr. Linden.

Unless you feel that you really need this answer for purposes of clarification of the record or an appeal— [75] MR. GUCCIARDO: I really do think I need it, Your Honor.

I like to believe that I don't ask questions that are unnecessary.

JUDGE GERAGHTY: As a hypothetical question, Mr. Cash, assuming that there is a bonded warehouse and I will take it as a hypothetical, assume that there is, then go ahead and ask your question, Mr. Gucciardo.

BY MR. GUCCIARDO:

Q Is it the usual procedure, assuming there is a bonded warehouse at the 21st Street pier facility, to strip the container, put it in the warehouse, have Customs clear it and then deliver it to the consignee?

A Yes, sir.

Q Does the consignee—now, this is not a general question, does the consignee arrive at the pier facility at 21st Street and pick up the cargo that is located at that pier, is that the end?

A No, sir.

The consignee will not necessarily pick up the cargo.

Q Does the consignee send a truckman to pick it up?

A Under normal—under many conditions a truck would come down acting for the consignee, sir.

Q When the truckman picks it up and signs a receipt to the [76] stevedoring company, do your obligations as a stevedoring company end with the signed receipt from the truckman?

JUDGE GERAGHTY: If you know, Mr. Cash?

THE WITNESS: I don't know, sir.

BY MR. GUCCIARDO:

Q You are not familiar with the loading and unloading of vessels with the International Terminal Operating Company?

MR. LINDEN: I object.

He did not say that.

MR. GUCCIARDO: This goes to the veracity.

JUDGE GERAGHTY: Mr. Gucciardo, I am not going to allow you to ask the question in that way.

He says he doesn't know when the obligation as a matter of contractual agreement ends.

MR. GUCCIARDO: That is what you said, but I did not ask that question.

JUDGE GERAGHTY: That is the way I interpreted your question.

MR. GUCCIARDO: I did not intend contractual agreement.

I realize that this gentleman may not know what this means, either.

MR. LINDEN: I certainly didn't.

BY MR. GUCCIARDO:

Q Mr. Cash, when a container is taken off a vessel and [77] it is stripped, and it is then delivered to the truckman who is sent by the consignee, does the stevedoring company after the truckman signs for the receipt of the goods, have anything further to do with that cargo?

A Yes, sir.

Q What do they have to do with it?

A Take care of any objections the receiver or consignee may have when he makes known his shortages, his damages, things of that nature, that would continue on for a period of time.

Q You are talking about claims now?

A Yes, it is part of it.

Q But does the stevedoring company have anything to do physically with that cargo after the truckman, truckman's consignee accepts it and signs a receipt for it?

A Just like any other freight station, no.

It would have finished.

Q Up until the time that the truckman picks up the cargo, is it not true that whatever handling has to be done in relation to this cargo, is done by longshoremen?

MR. LINDEN: Just a minute.

I object to that.

JUDGE GERAGHTY: It is an awfully broad question, Mr. Gucciardo.

Any handling.

[78] MR. GUCCIARDO: All right.

Let us get down to the nitty-gritty of it.

BY MR. GUCCIARDO:

Q Is it not true that when it is stripped from a container, is it put on board the truck by longshoremen?

A The truck loader may do it himself, sir.

Q He may do it himself?

A Yes, sir. Sure.

Q In conjunction with the longshoremen?

A In conjunction with them. Yes, sir, you have to have a checker there.

Q It may be the same checker as we have here, Mr. Blundo?

A It is quite possible, sir. I don't know.

Q And also working with the checker and the legman—incidentally, that is the man who works on the truck?

A Yes, I am familiar with that.

Q With the trucker known as the legman?

A Yes, sir.

Q You may have a hilo operator, too?

A Yes.

Q He is a longshoreman?

A Yes, sir.

MR. LINDEN: I object to the word "longshoreman" unless it is defined.

[79] JUDGE GERAGHTY: I would think the definition of longshoremen will be up to me.

I am not taking Mr. Gucciardo's statement of nominating everybody as longshoremen, ipso facto, as longshoremen.

MR. LINDEN: That is the reason I made my objection.

BY MR. GUCCIARDO:

Q Mr. Cash, Is the ITO Company a member of the New York Shipping Association?

MR. LINDEN: I object.

It is immaterial.

We are, but it is immaterial.

JUDGE GERAGHTY: What is the materiality?

MR. GUCCIARDO: If I declare the materiality now, I am going to tip off this man as to how to answer.

JUDGE GERAGHTY: With that representation, I will allow it for the purpose of the record.

THE WITNESS: Is the ITO company a member of—

BY MR. GUCCIARDO:

Q The New York Shipping Association?

A Along with many other port associations, they are also a member of the New York Shipping Association.

Q Does the New York Shipping Association have a contract with the International Longhoremen's Association?

MR. LINDEN: I object.

It is immaterial.

[80] JUDGE GERAGHTY: What is the materiality, Mr. Gucciardo?

MR. GUCCIARDO: The materiality is that ITO only handles longshoremen to handle their cargo, Your Honor, and I am coming to that in a minute.

JUDGE GERAGHTY: Are you trying to establish that ITO is an employer?

MR. GUCCIARDO: That is an employer that engages solely longshoremen to work on the piers.

MR. LINDEN: Is Mr. Gucciardo confusing the word longshoremen with the International Longshormen's Association?

Is that what he is trying to distinquish?

JUDGE GERAGHTY: Mr. Linden, let me be clear.

I want to be sure that I understand the purpose and direction of your question.

You are trying to establish that ITO is an employer as defined in the Act?

MR. GUCCIARDO: That is correct.

JUDGE GERAGHTY: Don't you think you have already done that?

MR. LINDEN: We have already agreed to that.

JUDGE GERAGHTY: It was conceded.

MR. GUCCIARDO: Only because I anticipate a possible appeal in this case, do I have to go a little bit further, Your Honor.

[81] MR. LINDEN: We make the concession.

JUDGE GERAGHTY: Without the concession, even it was my understanding as to jurisdiction.

So, if you are going to concede that he was an employer as defined by the Act—

MR. LINDEN: ITO is an employer generally as defined by the Act, but it does not apply to whether the longshoreman workers has jurisdiction over this accident.

JUDGE GERAGHTY: Your association goes to employer and not employee.

MR. GUCCIARDO: I will direct my question to the the employee phase of it.

BY MR. GUCCIARDO:

Q Mr. Cash, are you familiar with the operations of terminal labor and gangs on board vessels and on the pier? What they are supposed to do?

A Generally, yes, sir.

Q Is it not true that a checker or any terminal laborer is assigned by the foreman at the beginning of the day as to the particular job he may do?

A Within the class as broken down, yes, sir.

Q Is it not true that he may be assigned to check a vessel and the cargo on board a vessel, and work on board a vessel on a particular day?

MR. LINDEN: Agreed.

[82] MR. GUCCIARDO: Your Honor, I would rather have this type of answer directly from the witness.

JUDGE GERAGHTY: Go ahead and answer the question if you can answer it, Mr. Cash.

THE WITNESS: Now, the way I will answer the question, just as you asked it, sir, the answer would be no, sir.

BY MR. GUCCIARDO:

Q Are you telling us by that answer, then, that a checker cannot be assigned to a vessel for the purposes of checking cargo on that vessel?

A No, sir.

I am not answering it that way, sir.

Q Well, would you answer it that way now.

I am asking the question directly.

Can a checker receive an assignment in the morning by the foreman on the job or the block boss to go on board a vessel for the purposes of checking cargo on that vessel?

MR. LINDEN: I object.

It is immaterial to this case.

They were not loading or unloading or having anything to do with vessels at this pier.

JUDGE GERAGHTY: I would agree that the witness did not testify to anything along those lines on his direct examination.

I am allowing you great leeway in that, but your [83] client has testified to that and it has not been contradicted.

You have already gotten it from your own witness.

Let us pass on to another area because I don't think this is really relevant and material at this point in time.

It is not an issue as I see it.

BY MR. GUCCIARDO:

Q Mr. Cash, at the 21st Street facility, do you also load and unload vessels?

A Yes, sir, we do.

Q Do you also load and unload lighters?

A Yes, sir.

Q Is it the job of the terminal labor to load and unload lighters?

A We don't refer to it as terminal labor.

Extra labor, they will call it.

Q Is extra labor the same as terminal labor, whether you know it as that or not?

A You have a box there, you may have people to unload a lighter.

Q And apparently you are not familiar with the fact that the new contract says that extra labor is more to be defined as terminal labor?

MR. LINDEN: I object to that—

JUDGE GERAGHTY: Mr. Linden, I don't need your objection.

[84] That is an improper question.

BY MR. GUCCIARDO:

Q In the loading and unloading of lighters, are checkers assigned to them?

MR. LINDEN: I object.

MR. GUCCIARDO: It goes to the general activity that this man could be assigned to at a general facility.

MR. LINDEN: He is not testifying to that.

JUDGE GERAGHTY: This is cross-examination.

I assume what you are trying to establish is maritime employment, Mr. Gucciardo?

MR. GUCCIARDO: That is right, Your Honor.

JUDGE GERAGHTY: On that basis, I will allow the question.

THE WITNESS: Of my own personal knowledge, I have actually seen a checker standing on the pier, checking the drafts of cargo coming off a lighter, sir.

BY MR. GUCCIARDO:

Q Have you ever seen them physically on the lighter where the lighter is being loaded?

A No, sir.

Of my own personal knowledge I have not seen a checker myself, personally standing physically inside of the lighter.

It is so long I don't remember when, sir.

[85] Q How often do you go down to the pier, sir?

A I have had a very slack week this week.

Is this off the record?

JUDGE GERAGHTY: No, you are testifying.

THE WITNESS: I have had a slack week this week. I was down there two days—

MR. GUCCIARDO: In the course of—

MR. LINDEN: Let him answer the question.

JUDGE GERAGHTY: Let him answer the question, Mr. Gucciardo.

Don't interrupt him.

Mr. Cash, you have been down to the pier how often this week?

THE WITNESS: Two days.

BY MR. GUCCIARDO:

Q The course of a month, how many times have you been on the piers?

A It depends on what the activities are.

It is difficult for me to give a specific answer to actual number of days or hours.

Q Your office is actually located at 17 Battery Place?

A Yes.

Q Is that where you spend most of your time?

A No, sir.

On the piers and at the other ports in my general [86] duties.

Q When these vans are stripped for American Export Lines, are the truckmen sometimes located right on the pier, and taken away directly?

A I do not know, sir.

Q Can they be?
A Can they?
Q Yes.
A Oh, it is possible, sir.
Q Could you tell us from the time that a container is offloaded from a vessel, how long it usually takes until the consignee actually takes physical delivery of the merchandise at the pier facility?
A I could not give an answer to that at all, sir.
It may vary. It would be strictly hypothetical, sir.
It takes a long time.
Sometimes a reasonably short time.
Q Do you know what demurrage is?
A Yes, sir. I am aware of what it is.
Q Does demurrage apply to all consignees?
A As far as ITO, yes, sir, it does.
Q Does that mean that they have a limited number of days in which to pick up their cargo?
A Yes, sir.
And then they are charged demurrage.
[87] Q What is demurrage, for the record?
A Demurrage is a fine for allowing the cargo to remain on the pier or it is an assessment or a charge for utilizing pier facilities for storage beyond the free time.
Q In other words, it is not the purpose of ITO to store the goods for the consignee on that pier?
They want to get the stuff in and out so that they have the pier facilities free for this cargo constantly coming in or constantly going out, is that true?
MR. LINDEN: I object.
Unless he means that is the only purpose.
JUDGE GERAGHTY: Gentlemen, I am really inquiring as to what is the relevancy of the questions with reference to demurrage, Mr. Gucciardo.
Why are you asking them?
MR. GUCCIARDO: To show that this, demurrage, is a charge used in maritime activities, Your Honor, only.

JUDGE GERAGHTY: How will this tell me whether or not Mr. Blundo is an employee under the Act?
MR. GUCCIARDO: Well, just to show that it is in maritime activity that demurrage is charged.
Otherwise, it is a storage charge. He has already testified it is in the form of a penalty, because they don't store cargo there.
They have to get rid of it.
[88] MR. LINDEN: He used the word "penalty, charge, storage," he used all of those words.
JUDGE GERAGHTY: I don't believe that this is really relevant to a determination as to Mr. Blundo's status at the time that he sustained his injury.
So please go on to another area, Mr. Gucciardo.

BY MR. GUCCIARDO:

Q There is no question, is there, Mr. Cash, that the ITO operates I believe it is three piers at what is known as pier 21st Street, Brooklyn, New York.
A Three piers in Brooklyn, New York?
Q At what is known as pier 21st Street, in Brooklyn, New York, are there three finger piers at that location or two?
A If you can clarify, sir, for my edification, what is a finger pier, sir?
JUDGE GERAGHTY: Mr. Gucciardo, again, why are we going into the number of piers now?
MR. GUCCIARDO: I want to show Your Honor that while they may be engaged in stuffing or stripping a container at one part of the pier, that they may be unloading a vessel at a different part of the pier.
JUDGE GERAGHTY: What is that going to prove?
MR. GUCCIARDO: To show that it is maritime employment, generally.
[89] JUDGE GERAGHTY: With respect to Mr. Blundo?
MR. GUCCIARDO: Yes, sir.

JUDGE GERAGHTY: I don't see it that way.

I don't believe it is relevant and material.

I think we are just cluttering the record at this point.

MR. GUCCIARDO: I want to proffer, Your Honor, this evidence that Mr. Blundo could be finished stripping or checking a stripped container and then could be assigned to checking cargo directly coming from a vessel at that facility.

JUDGE GERAGHTY: Mr. Gucciardo, that is already in the record about three times.

Your statement will stand in the record as a proffer and be accepted as that.

I will not allow you to explore it on questioning.

MR. GUCCIARDO: I have nothing further, Your Honor.

REDIRECT EXAMINATION

BY MR. LINDEN:

Q There is a difference between cargo that must be put in a bonded warehouse and cargo that is kept in custody until Customs clears it?

A That would have to be cargo that is directed to be held and duties paid to the Customs for clearance will be held in bonded or custody there.

But in all cases, import cargo would have to be [90] cleared through the Customs, anyway, sir.

MR. LINDEN: That is all.

JUDGE GERAGHTY: Mr. Cash, let me ask you this one question.

Apparently, at least at the time of this accident, Mr. Blundo's, possibly not now, ITO could load or strip containers for several companies other than ITO under contract with them such as American Export, am I correct?

The container that was being worked on belonged not to ITO, in other words?

THE WITNESS: No, sir, it did not.

JUDGE GERAGHTY: It belonged to someone else?

THE WITNESS: Yes.

JUDGE GERAGHTY: And ITO was acting either to strip or to load containers for someone other than ITO?

THE WITNESS: Other than ITO, yes, sir.

JUDGE GERAGHTY: Now, the people that would put the cargo into a container, for example, will they be ITO employees or the owner of the container?

That is, American Export employees or ITO employees?

THE WITNESS: Well, sir, if I may.

If we receive a container and we are going to strip it, the container, for another company, well whoever put that cargo into that container, I wouldn't know, sir.

It could be done by anyone.

[91] JUDGE GERAGHTY: But any cargo that would come into the 21st Street pier to be stripped, whose employees would do the stripping?

THE WITNESS: On 21st Street, those would be a team that would be assigned by ITO to strip cargo from a container that has been delivered to a pier and it came from American Export operation, wherever it might have been.

JUDGE GERAGHTY: Or anyone else that you had contracts?

THE WITNESS: Yes, sir.

JUDGE GERAGHTY: But the employees doing the stripping would be ITO employees?

THE WITNESS: ITO employees but doing the actual physical work.

JUDGE GERAGHTY: I mean the labor itself.

THE WITNESS: Yes, sir.

JUDGE GERAGHTY: Thank you, Mr. Cash.

You are excused.

You may step down, sir.

Mr. Linden, do you have any other witnesses?

MR. LINDEN: No, Your Honor, I do not.

MR. GUCCIARDO: I want to rebut but perhaps counsel will agree if this is in the record or Your Honor will agree that this is in the record; that the claimant did testify that this was a bonded warehouse.

[92] If there is any question about that, I will put him back on the stand.

JUDGE GERAGHTY: I am aware of what he testified to, that is why I queried you before because there was no testimony contradicting it.

If that is all, is that what you are going to ask?

MR. GUCCIARDO: Yes.

JUDGE GERAGHTY: You have a right for rebuttal.

Mr. Blundo, you are still under oath, sir.

Just be seated.

Whereupon,

CARMELO BLUNDO

was called as a witness for rebuttal examination and testified as follows:

REBUTTAL EXAMINATION

BY MR. GUCCIARDO:

Q Mr. Blundo, do you of your own knowledge know whether or not ITO maintains a bonded warehouse at the 21st Street pier facility in Brooklyn where you worked?

A At that time, yes.

Q How do you know this, sir?

A Because it was a Custom shack right inside the warehouse.

It had separate guards and everything.

Q The Custom shack, what do you mean by that, what [93] do you mean by that?

A A Customs room was right inside there. Inside the warehouse.

Q Who were the men that were in the Customs shack, as you put it?

A Customs.

Q Working for the United States Customs Service?

A Right.

Q Did you know Mr. Cash who testified here this afternoon?

A No, I didn't.

Q Have you ever seen him down at that pier?

A No, I have never seen him.

Q How many years did you say you worked there?

A Five years.

Q Did he ever talk to you personally about this accident?

A Nope.

Q Does ITO at that particular facility, pier 21st Street, load and unload vessels?

A Yes.

Q Have you worked for ITO loading and unloading as a checker, that is?

MR. LINDEN: I object.

This has all been covered on direct examination.

[94] BY MR. GUCCIARDO:

Q At that facility?

A Not at that facility.

JUDGE GERAGHTY: This is rebuttal, Mr. Gucciardo.

You are going to have to rebut only what Mr. Cash testified to and that has not been testified by Mr. Cash.

BY MR. GUCCIARDO:

Q Do you, at that facility, load and unload lighters?

A Sometimes.

Q When you load and unload a lighter, are you physically located on the lighter or not?

A Sometimes.

MR. LINDEN: I object.

He was not near a lighter during the course of his activities at the time he was hurt.

JUDGE GERAGHTY: Mr. Gucciardo, on rebuttal, I would take it that you would direct your rebuttal to rebutting Mr. Cash's direct testimony.

MR. GUCCIARDO: All right.

BY MR. GUCCIARDO:

Q At the time that you were injured, the merchandise that you were directly involved with, where was it being —what was being done with it?

MR. LINDEN: He testified to that.

JUDGE GERAGHTY: Mr. Gucciardo, this is rebuttal.

[95] Mr. Cash did not testify to that.

Mr. Blundo did.

So there is no purpose in asking him that again.

MR. GUCCIARDO: I have nothing further.

BY MR. LINDEN:

Q What is a bonded warehouse?

A A bonded warehouse is where you store cargo coming out of a container.

Q Is it all cargo that is moved from a container, cargo that must be—

A Well, it is just—

Q Mr. Blundo, please—

JUDGE GERAGHTY: Let Mr. Linden finish the question first.

BY MR. LINDEN:

Q Is all cargo that comes out, that comes in from overseas, cargo that has to be put in a bonded warehouse?

A No.

Q What does the word bonded mean?

A Where cargo is insured.

Q Insured?

A By either the United States government—in other words, it is a warehouse where security is even more.

Q Did you say the United States government insures it?

A No, I didn't say the United States government.

[96] It is in the custody of the U.S. Customs.

Q Is there something different by being in custody of government and bonded?

A This is specifically for U.S. Customs.

Q Would you tell me whether there is a difference in cargo kept by Customs as contrasted by cargo for which there must be some sort of a bond, do you know?

A There is, because you see, it is a separate operation, has its own guards, in other words, it has its own men and nobody can enter or leave there without permission of the Customs.

JUDGE GERAGHTY: Mr. Linden, I am not going to let you go any further with this.

The witness, I think, is trying to explain what he means by bonded as much as he possibly—

MR. LINDEN: That is the purpose of my question. He doesn't know.

Then I have no more questions.

JUDGE GERAGHTY: Yes, Mr. Linden.

I saw where you were going.

Mr. Blundo, thank you, sir.

You may be seated.

MR. LINDEN: May I say it is immaterial anyway.

But I thought I had to cover it in order to protect the record.

[97] JUDGE GERAGHTY: Yes, I didn't mean that.

It is just the fact that we are dealing with terminology, specifically, which again involves at least collaterally definitions which may better be found in Black's than somewhere else, rather than Mr. Blundo's understanding.

Does either side have any further evidence?

MR. GUCCIARDO: No, Your Honor.

MR. LINDEN: No.

JUDGE GERAGHTY: Gentlemen, we are at the point, then, where you may make closing argument or submit on the record.

I might indicate there is some possibility I will not be with the agency January or much beyond January. I am hopeful, at least, of that possibility, not to reflect adversely on the agency that I am with, just that there may be.

I am telling you so that you have a time frame reference.

I am prepared to rule orally on this matter if you gentlemen wish to make oral argument.

MR. GUCCIARDO: I will make a brief oral argument and I would go along with you.

JUDGE GERAGHTY: I will not preclude you.

I will come back and write the decision no matter where.

[98] MR. LINDEN: Mine won't be so brief.

JUDGE GERAGHTY: Off the record.

(Discussion off the record.)

JUDGE GERAGHTY: Back on the record.

Gentlemen, I take it there is no further evidence?

MR. LINDEN: That is right, sir.

JUDGE GERAGHTY: And there is no closing argument?

You are going to submit written briefs.

I will set the briefs as 10 January and there will be no continuation of time granted other than for the most dire exceptions.

It is going to be the old saw that you are excused from the exam only if you are turned in on a stretcher.

Gentlemen, the record will only be adjourned, and Mr. Gucciardo, you will also, if you are claiming fees, follow the usual procedure with respect to submitting them.

Thank you very much.

The record is adjourned.

(Whereupon, at 11:28 o'clock, a.m., the hearing was adjourned, with the above noted stipulation.)

APPENDIX L

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPEAL FROM BENEFITS REVIEW BOARD

Case No. 75-4249

In the Matter of the Claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act made by

CARMELO BLUNDO,
Claimant-Appellee,

v.

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,
Self-Insured Employer-Appellant.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Consolidated with Cal. #1014
(& in 76-4009, 76-4042, 4043)

DATE	FILINGS—PROCEEDINGS
11-19-75	Filed petition for review
11-19-75	Served copy of petition under covering letter on (B.R.B.)
12- 1-75	Filed receipt of service of petition on (B.R.B.)
1-14-76	Filed order; record by 2-3-76 w/dismissal in default; petitioner's brief and joint appendix by 3-1-76 w/dismissal in default; respondent's brief by 3-31-76; argument to be ready week of 4-12-76 (PC)

DATE	FILINGS—PROCEEDINGS
1-19-76	Filed record (original papers of Benefits Review Board)
2- 3-76	Filed motion to amend and reform caption, Director, Office of Workers' Compensation Programs (w/pfs)
2- 4-76	Filed order; appellant's brief and joint appendix by 3-31-76; appellee's brief by 4-30-76; argument to be ready week of 5-10-76
2- 6-76	Filed memorandum in opposition to motion of the Director to be named a party respondent (w/pfs)
2-10-76	Filed order granting motion to amend caption
3-30-76	Filed motion for leave to file brief as amicus curiae, National Association of Stevedores (w/pfs)
3-31-76	Filed brief, petitioner (ITOC) w/pfs
3-31-76	Filed appendix, petitioner (ITOC) w/pfs
4- 1-76	Filed order granting motion for leave to file brief as amicus curiae, (National Association of Stevedores)
4- 1-76	Filed brief, amicus curiae (National Association Of Stevedores)
4- 6-76	Filed order granting motion to consolidate with 76-4009, 76-4042, 76-4043
4-23-76	Filed brief, petitioner (Pittston Stevedoring Corp. & Home Insurance) w/pfs
4-23-76	Filed appendix, petitioner (Pittston Stevedoring Corp. & Home Ins.) w/pfs
4-26-76	Filed motion to reform caption, Director OWCP (w/pfs)
4-28-76	Filed motion for extension of time to file briefs, respondent (w/pfs)

DATE	FILINGS—PROCEEDINGS
4-29-76	Filed motion for extension of time to file brief, respondent (Dellaventura & Scaffidi) w/pfs
4-29-76	Filed briefs, respondent (Carmello Blundo) w/pfs
4-30-76	Filed order granting motion to reform the caption to include the Director, Office of Workers' Comp. Programs as a party respondent
4-30-76	Filed briefs, respondent (Ralph Caputo) and supplemental appendix (w/pfs)
4-30-76	Filed motion to file briefs amicus curiae and to participate in oral argument, International Longshoremen's Association, AFL-CIO (w/pfs)
5- 3-76	Filed order granting motion to extend time to file respondent's brief to 5-7-76
5- 5-76	Filed order granting motion to file respondent's brief (Dellaventura & Scaffidi) to 5-14-76
5- 6-76	Filed motion for extension of time to file brief, respondent (Director, OWCP) w/pfs
5-10-76	Filed order granting motion for leave to file a brief amicus curiae as to filing a brief only (International Longshoremen's Assoc. AFL-CIO)
5-10-76	Filed brief, amicus curiae (International Longshoremen's Assoc. AFL-CIO)
5-11-76	Filed order granting motion for extension of time to file brief, respondent (Director, OWCP) to 5-14-76
5-12-76	Filed reply brief, petitioner (ITOC)—w/pfs
5-14-76	Filed brief, respondent (John Scaffidi)—w/pfs
5-14-76	Filed brief, respondent (Anthony Dellaventura)—w/pfs
5-17-76	Filed brief, respondent (Director, Office of Workers' Compensation) w/pfs

DATE	FILINGS—PROCEEDINGS
5-20-76	Argument heard (by: Lumbard, Friendly, Oakes)
6- 2-76	Filed reply briefs, petitioner (Pittston Stevedoring Corp.) w/pfs (5cc)
6-21-76	Filed supplemental record (original papers of B.R.B.)
7- 1-76	Judgment affirmed (Friendly, C.J.)
7- 1-76	Concurring and dissenting (Lumbard, C.J.)
7- 1-76	Filed Judgment
7-13-76	Filed four statement of costs, respondent (Blundo) (filed in 76-4009, 76-4042, 76-4043)—also for Dellaventura, Scaffidi and Caputo
7-16-76	Filed affidavit in opposition to statement of costs, petitioner (ITOC)—w/pfs
7-22-76	Filed reply affidavit to petitioner's opposition to claimant's bill of costs, respondent (Blundo)—w/pfs
8- 3-76	Issued mandate (opinion, judgment and four statements of costs—Blundo, Dellaventura, Caputo and Scaffidi) & in 76-4009, 76-4042 and 76-4043
8- 4-76	Returned record (original papers of BRB) (& in 76-4009)
8-25-76	Filed petition for rehearing w/pfs
9- 3-76	Filed order denying petition for rehearing (& in 76-4009, 76-4042, 76-4043)
9-15-76	Filed order correcting caption (& in 76-4009, 76-4042, 76-4043)
10- 6-76	Filed notice of filing petition for certiorari (SC #76-454)
12-13-76	Filed certified copy of order by Supreme Court granting petition for certiorari

No. 76-446

Supreme Court, U. S.
FILED
NOV 12 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

NORTHEAST MARINE TERMINAL COMPANY, INCORPORATED and STATE INSURANCE FUND, PETITIONERS

v.

RALPH CAPUTO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

WILLIAM J. KILBERG,
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Washington, D.C. 20210.

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MEMORANDUM FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is not yet reported. The opinion of the Benefits Review Board (Pet. App. 47a-50a) is reported at 3 BRBS 13.[1] The administrative law judge's decision (Pet. App. 51a-55a) is not reported; a synopsis of it appears at 2 BRBS 4 (ALJ).

JURISDICTION

The judgment of the court of appeals (Pet. App. 56a-58a) was entered on July 1, 1976. A petition for

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[1]The Benefits Review Board Service, published by Matthew Bender & Company, is the reporter of the Board's decisions.

rehearing was denied on September 3, 1976 (Pet. App. 59a-60a). The petition for a writ of certiorari was filed on September 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Longshoremen's and Harbor Workers' Compensation Act provides compensation to a longshoreman injured on land while loading cargo, previously discharged from a ship, into a truck for overland carriage.

STATUTES INVOLVED

1. Prior to its amendment in 1972, the Longshoremen's and Harbor Workers' Compensation Act provided in relevant part:

Section 2(3), 44 Stat. 1425, 33 U.S.C. 902(3):

> The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 3(a), 44 Stat. 1426, 33 U.S.C. 903(a):

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

2. As amended by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251 *et seq.*, the Act now provides in relevant part:

Section 2(3), 86 Stat. 1251, 33 U.S.C. (Supp. V) 902(3):

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 3(a), 86 Stat. 1251, 33 U.S.C. (Supp. V) 903(a):

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, repairing, or building a vessel).

STATEMENT

Ralph Caputo was a longshoreman usually employed by Pittston Stevedoring Corporation to do a variety of tasks on the waterfront (Pet. App. 11a). When Pittston had no work available, Caputo sought similar employment with other maritime employers through the Waterfront Commission hiring hall. On April 16, 1973, he was sent to petitioner Northeast Marine Terminal Company's 39th Street Pier to work as "terminal labor" (Pet. App. 48a). He was assigned by Northeast to load a consignee's truck with cargo that had been discharged from a ship at least five days before (*ibid.*). While using a dolly to move cargo inside the truck, he fell and injured his foot (*ibid.*).

Petitioners resisted Caputo's claim for compensation, arguing that his injury was not within the coverage of the Act because he was not engaged in maritime employment at the time of the injury. The administrative law judge awarded Caputo compensation, relying on the Benefits Review Board's decision in *Avvento* v. *Hellenic Lines, Inc.*, 1 BRBS 174.

Avvento held that an employee injured while loading cargo into a consignee's truck was covered by the Act. The Board reasoned that the employee was engaged in maritime employment because he was performing the last of a series of operations necessary to transfer the ship's cargo from its hold to the land carrier; the employee therefore met the "status" test established by Section 2(3) of the Act. The Board also concluded that the employee met the "situs" test of Section 3(a) because the injury occurred in a terminal customarily used to unload a vessel and transfer possession of its cargo. Concluding that *Avvento* controlled the instant case, the Board affirmed the administrative law judge's decision (Pet. App. 48a). The Board declined petitioners' invitation to hold that the claimant's employment had lost its maritime character because the cargo had been transferred from the vessel to the terminal five days before Caputo loaded it into the consignee's truck (*id.* at 48a-49a).

A divided panel of the court of appeals upheld the Board's decision.[2] The court did not endorse the Board's

[2]The panel questioned whether the Director, Office of Workers' Compensation Programs, the federal respondent here, was a proper party in the court of appeals. Pet. App. 12a-14a n. 5. It concluded that some federal participation was proper, however, and therefore did not reach the question whether the Benefits Review Board itself should have been substituted for the Director. Petitioners did not seek substitution in the court of appeals and have not presented in their petition any question concerning the identity of the proper federal party. The question therefore is not before the Court in this case.

approach, however; it thought that the Act covers claimants engaged in the handling of cargo up to the point at which the consignee receives delivery and begins to transport the cargo from the pier, but it added the *caveat* that this would be so if "the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel" (Pet. App. 42). The court thought that the record was less than clear on several questions concerning the structure of waterfront activities and the tasks of waterfront workers, but it found it unnecessary to remand the case to the Board.[3]

DISCUSSION

The courts of appeals are in serious conflict concerning the extent of shore-side coverage under the 1972 amendments to the Act. The Benefits Review Board has concluded that the coverage extends to any person engaged in taking cargo off a vessel, transferring it to a terminal or pier, working with it in the terminal, and transferring it to land transportation or the consignee's possession. The Fifth Circuit has endorsed the Board's position in this regard.[4] *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533, 543-544. The Fourth Circuit, on the other hand, has held that the coverage of the Act ends once the cargo has been removed from the vessel and from its container. *I.T.O. Corp. of Baltimore* v. *Benefits Review Board*, 529 F. 2d 1080, adhered to

[3]Compare Pet. App. 22a-24a and n. 13 with Pet. 3-4.

[4]So have respected scholars. See Gilmore and Black, *The Law of Admiralty* 423-430 (2d ed. 1975). Gilmore and Black, however, would discard any "status" test and make the "situs" test dispositive, thus providing coverage even more extensive than the Board's position allows.

en banc, No. 75-1051, decided August 26, 1976.[5] The Fourth Circuit therefore would have denied recovery to Caputo.

The court of appeals in this case took an intermediate position, awarding compensation for an injury after the first point of rest, but apparently requiring Caputo to establish not only that he was engaged in transferring cargo from the terminal to a land carrier but also that he spent a significant part of his time loading or unloading vessels. The First Circuit has indicated that it is inclined to agree with the decision in the instant case. *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F. 2d 264, 272-277, petition for a writ of certiorari pending, No. 76-571. The Third Circuit has not yet addressed the precise problem presented here, but in dealing with a related problem it endorsed the views of Judge Craven, who dissented in the *I.T.O.* case and supported the Board's position. *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs*, No. 76-2039, decided August 5, 1976, slip op. 16-18.[6]

This conflict among the circuits is undesirable. It has created uncertainty, and uncertainty has led to a flood of litigation. Thirty-seven cases involving the question presented here are now pending before the Benefits Review Board, and 20 more are pending in the courts of appeals. In 1975 approximately 160,000 injuries were reported by employers under the Act, and the Department of Labor informs us that more than half of those

[5]Three judges believe that coverage ends when the cargo reaches its first point of rest after leaving the vessel; two judges endorse the Board's position; a sixth judge believes that coverage extends to activity (such as "stripping" containers) within the terminal after unloading, but no farther.

[6]But cf. *id.* at slip op. 8.

injuries occurred on land. In the same year nearly $80 million was paid under the Act in compensation and medical benefits. The Act is designed to be self-administering in most cases, but this has become impossible in light of the prevailing uncertainties concerning the extent of the Act's coverage. We therefore believe that the Court should resolve the conflict among the circuits as expeditiously as possible.

This is an excellent case for such resolution. Caputo was engaged in loading cargo into a consignee's truck, and, under the Board's rule, this is the last step of the transfer process that is covered by the Act. If Caputo is covered then other employees who work with the cargo in the terminal building itself[7] are covered *a fortiori*. If the Court should hold that Caputo is not covered, the Court's rationale presumably would indicate the appropriate disposition of other cases involving activities more proximate to the loading and unloading of the vessel. Moreover, although the court of appeals thought that the record in this case was not complete (Pet. App. 22a-24a), that did not deter it from disposing of the case in its present posture. If this Court should hold, contrary to our submission, that additional "legislative" evidence of the sort envisaged by the court of appeals should be taken, it could remand the case to the Board for that purpose. Cf. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326; *South Prairie Construction Co.* v. *Local 627, Operating Engineers*, No. 75-1097, decided May 24, 1976.

[7]Such as "stuffers" and "strippers." See *International Terminal Operating Co., Inc.* v. *Blundo*, petition for a writ of certiorari pending, No. 76-454, which was consolidated by the Second Circuit with the instant case and decided in the same opinion. *Stockman* also involves activity within the terminal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General.

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NOVEMBER 1976.

DOJ-1976-11

Supreme Court, U. S.
FILED
JAN 21 1977
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-444

NORTHEAST MARINE TERMINAL COMPANY, INC.
and STATE INSURANCE FUND,

Petitioners,

—against—

RALPH CAPUTO and Director, Office of Workers' Compensation Programs, United States Department of Labor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

PETER M. PRYOR
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-444

NORTHEAST MARINE TERMINAL COMPANY, INC.
and STATE INSURANCE FUND,

Petitioners,

—against—

RALPH CAPUTO and Director, Office of Workers' Compensation Programs, United States Department of Labor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The 2-1 opinion of the Court of Appeals, printed in appendix A to the petition for certiorari (Pet. 1a), is reported at 544 F. 2d 35 and is unofficially reported in 1976 A.M.C. 881. The decision of the Benefits Review Board, United States Department of Labor, printed in appendix B to the petition for certiorari (Pet. 47a), is reported in 3 BRBS 13. The decision and order of the Administrative Law Judge, United States Department of Labor, printed in appendix C to the petition for certiorari (Pet. 51a), is unreported but there is a synopsis in 2 BRBS 4.

Jurisdiction

The judgment of the Court of Appeals dated July 1, 1976, printed in appendix D to the petition for certiorari (Pet. 56a)* was entered on July 1, 1976. The petition for certiorari was timely filed on September 27, 1976. The petition was granted on December 6, 1976 and was consolidated for argument with *International Terminal Operating Co., Inc.* v. *Blundo,* (U.S. 76-454), a consolidated supplemental appendix* having been filed in both cases. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statute Involved

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended in 1972, 86 Stat. 1251, 33 U.S.C. 902(3), the pertinent language being: "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations • • • ." Also involved for purposes of construing Section 2(3) are Section 2(4), 33 U.S.C. 902(4), and Section 3(a), 33 U.S.C. 3(a), of the Act. Those three Sections of the Act as they read before and after the 1972 Amendments are printed in the appendix to this brief.

* Pages in the appendices annexed to the petition for certiorari are referred to as Pet. a. Pages in the supplemental appendix are referred to as A.

Question Presented

When compensably injured, was respondent Caputo an "employee" as now defined by Section 2(3) of the Longshoremen's and Harbors Workers' Compensation Act, 33 U.S.C. 902(3)?

Statement

On the record, which consists of stipulations, respondent Caputo's testimony, and a map, (A1-A52), the Administrative Law Judge, whose "findings of fact • • • shall be conclusive if supported by substantial evidence in the record considered as a whole", 33 U.S.C. 921(b)(3), Pet. 26a, found that (Pet. 52a-54a):

On April 16, 1973, Caputo was injured while helping load boxes of cheese inside a consignee's truck which was parked 400 feet from the water but still inside a terminal[1] leased by Caputo's employer Northeast Marine Terminal Company, Inc.[2] The cheese had been discharged from a ship at least 5 days before, and was then stored on the terminal awaiting the truck's arrival. After a forklift vehicle put the cheese onto a rolling dolly inside the truck, Caputo was injured when he tripped over a backstop on the truck floor and caught his foot under the dolly. It was stipulated "that the

[1] The situs of Caputo's accident unquestionably met the requirements of § 3(a) of the Act, 33 U.S.C. 903(a), because the terminal adjoins navigable waters of the United States and parts of the terminal are used in loading and unloading ships.

[2] Petitioner Northeast is unquestionably an "employer" as defined in § 2(4) of the Act, 33 U.S.C. 902(4), because some of its employees "are employed in maritime employment, in whole or in part, upon the navigable waters of the United States", as therein defined.

work claimant was doing when injured was the same work with the same risk factor as would obtain wherever and by whomsoever trucks were loaded or unloaded with a dolly" (Pet. 54a).

There was additional undisputed evidence that Caputo, who said his occupation was "longshoreman" (A 7) and who was a member of the International Longshoremen's Association (A 9), usually worked for another employer in a gang which directly loaded and discharged ships (A 10, 13). Caputo was hired by Northeast on the accident date as a terminal laborer (A 14), a category called "extra labor/ freight handler" (A 5) variously used to load and unload trucks, containers, barges, lighters, and ship's stores and laundry (A 8). Northeast assigned Caputo to help consignees' truckmen load their trucks (A 5, 23, 38), which Caputo did all morning and after lunch until injured (A 29). After the boxes of cheese were discharged from the ship, the boxes were stored in a terminal warehouse on the perimeter of the yard where trucks were customarily loaded and unloaded (A 33, 43-44). A forklift brought the boxes from the warehouse and put them on the ground near the truck's tailgate (A 23, 39) from whence a forklift put the boxes inside the truck onto a dolly, and pushed the dolly toward the back of the truck (A 28). Caputo's job was to help pull the dolly further into the truck and take the boxes off the dolly and stow them in the truck (A 35-36).

On the ground that Caputo's injury was compensable only under New York law, petitioners contested Caputo's Longshoremen's and Harbor Workers' Compensation Act claim, which was referred to an Administrative Law Judge for hearing, pursuant to Section 19(d) of the Act, 33 U.S.C.

919(d), and 20 C.F.R. 702.331, et seq. The Judge sustained Caputo's claim on authority of *Avvento* v. *Hellenic Lines,* 1 BRBS 174 (1974), 1975 A.M.C. 153, which held that a truck loader, such as Caputo, is covered by the Act because:

> "The claimant's function was a step in the loading and unloading process as described in Section 3(a) of the Act. A part of that function was to load trucks for the removal of cargo from the pier. To say that once the goods have come to rest on the pier after being removed from the ship they are completely unloaded and no longer maritime in nature is erroneous in light of the 1972 amendments to the Act. • • • until cargo is delivered to a trucker or other carrier who is to pick it up for further transshipment, such cargo is in maritime commerce and all employees engaged in its movement to that point are engaged in maritime employment." 1975 A.M.C., pp. 154-155.

Petitioners appealed the Judge's decision and order (Pet. 51a) to the Benefits Review Board, pursuant to Section 21(b) of the Act, 33 U.S.C. 921(b). The Board affirmed on authority of its unappealed *Avvento* decision and its decision in *Adkins* v. *I.T.O. Corporation of Baltimore,* 1 BRBS 199 (1974), 1974 A.M.C. 2427, subsequently reversed sub nom. *I.T.O. Corp. of Baltimore* v. *Ben. Rev. Bd.* (1976), 529 F. 2d 1080 (4 Cir. 1975), reh. in banc 542 F. 2d 903, cert. pend. sub nom. *Adkins* v. *I.T.O. Corp. of Baltimore,* (U.S. 76-730), hereinafter cited as *Adkins.*

Petitioners appealed the Board's decision (Pet. 47a) to the United States Court of Appeals for the Second Circuit, pursuant to Section 21(c) of the Act, 33 U.S.C. 921(c).

In an opinion by Judge Friendly (Pet. 3a), Judge Lumbard dissenting (Pet. 45a), the Court of Appeals affirmed the Board on the ground, in Caputo's case[3], that the Act's 1972 "Amendments at least cover all persons meeting the situs requirements • • • [who] are engaged in the handling of cargo up to the point where the consignee has actually begun its movement from the pier (or in the case of loading, from the time when the consignee [sic.] has stopped his vehicle at the pier), provided • • • the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel." (Pet. 42a).

Summary of Argument

To avoid disparate, anomalous, and contentious coverage with consequent intolerable administrative difficulties and litigation which would be contrary to the fundamental purpose of the Act, Caputo's compensable status should be determined solely by the work he was doing when injured, and not by other work he frequently did. When injured, Caputo was not unloading a ship, nor was he engaged in maritime employment since the freight he was helping load in the truck was not in maritime commerce. Thus, a determination that his injury is not covered by the Act will be most consistent with the statutory language, legislative history, established maritime law, and traditional industry practice.

[3] Petitioners' appeal was consolidated for argument before the Court of Appeals with three others, and in a single opinion the Court dismissed one petition as untimely and another as moot and denied the other two on the merits. The other employer whose petition was denied on the merits is the petitioner in *International Terminal Operating Co., Inc.* v. *Blundo,* (U.S. 76-454), which has been consolidated herewith for argument.

ARGUMENT

I

Caputo's compensable status should be determined solely by the work he was doing when injured.

The threshold question is whether Section 2(3), 33 U.S.C. 902(3), "employee" status depends (1) on the work the injured person was doing (or had been assigned to do) at the time he was hurt or (2) on his job at that time and other work he generally or frequently did at other times. If, as suggested but not decided below[4], Caputo's otherwise state compensable injury is federally compensable because he usually worked for another employer in a gang which directly loaded and discharged ships (A 10, 13), then the Court may not need to construe the precise Section 2(3) meanings of "maritime employment", "longshoreman", "or other person engaged in longshoring operations".

There is no explicit answer to this question in either the Act or its legislative history.[5] In context, it appears un-

[4] "• • • whether the proviso [that the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel] is essential can be left for another day." (Pet. 42a)

[5] S.Rep. 92-1125, 92d Cong., 2d Sess.; H.R.Rep. 92-1441, 92d Cong., 2d Sess., 1972 U.S. Code Cong. and Adm. News, vol. 3, p. 4698. The identical portion of the Senate and House Reports entitled "Extension of Coverage to Shoreside Areas" is printed in the appendix to this brief.

Shoreside extension of coverage was scarcely mentioned during the May, June, and July 1972 hearings on H.R. 247, H.R. 3505, H.R. 12006, H.R. 150203, S. 525, S. 1547, and S. 2318. The only allusion in 332 pages of House hearings is on page 297 to the amphibious longshoreman whose coverage depended on which side of the water's edge he was working, and in 843 pages of Senate hearings the subject is touched upon only three times, pp. 38-39, 73-74, 176-177, a union official having stated that there was "very little criticism in terms of the coverage", pp. 73-74.

likely that expressed congressional intent to exclude from federal coverage "employees whose responsibility is only to pick up stored cargo for further trans-shipment", S.Rep., p. 13; H.R.Rep., p. 11, and implicit intent to exclude checkers "who are [not] directly involved in the loading or unloading functions", *ibid.*, was tacitly conditioned on whether those persons frequently loaded and unloaded ships. However, the Committees did somewhat ambiguously state their intent "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity", S.Rep., p. 13; H.R. Rep., pp. 10-11.

To the majority below, "otherwise covered for part of their activity" indicated congressional intent "to cover a person like Caputo who spent a significant part of his time working on vessels" (Pet. 38a). In *Stockman* v. *John T. Clark & Son of Boston,* 539 F. 2d 264 (1 Cir. 1976), cert. pend. sub nom. *John T. Clark & Son of Boston, Inc.* v. *Stockman,* (U.S. 76-571), hereinafter cited as *Stockman,* the Court thought the quoted Committee language meant to include "a steadily employed longshoreman whose duties periodically took him aboard ship", 539 F. 2d, p. 275, and that Section 2(3) "employee" status requires "bona fide membership in a class of employees whose members would for the most part have been covered some of the time under the earlier Act—not necessarily a demonstration by each claimant that he individually would have been covered", 539 F. 2d, p. 277. In *Sea-Land Serv.* v. *Director* [etc.], 540 F. 2d 629 (3 Cir. 1976), hereinafter cited as *Johns,* the Court held that the status test is "functional", 540 F. 2d, p. 636, and observed that "the dominant purpose of the 1972 amendments in extending the Act's coverage to

areas previously left to the states was to make more uniform the death and disability compensation system for maritime employees so that maritime workers would no longer walk into federal coverage, and out of state coverage, and vice versa, *in the course of a day's work.* [italics added] This sentiment is clearly expressed in identical language in both the House and Senate reports accompanying the legislation:" [thereinafter quoted], 540 F. 2d, p. 637. In *Jacksonville Shipyards, Inc.* v. *Perdue,* 539 F. 2d 533 (5 Cir. 1976), cert. pend. sub nom. *P.C. Pfeiffer Co., Inc.* v. *Ford,* (U.S. 76-641), hereinafter cited as *Ford,* the Court (we believe correctly) considered that the quoted Committee language "was speaking of one inequity of the old 'water's edge' approach, under which cargo handlers would walk in and out of coverage as they moved between ship and shore", 539 F. 2d, p. 541, fn. 21, and held, 539 F. 2d, pp. 539, 541, 542, in accord with *Weyerhaeuser Company* v. *Gilmore,* 528 F. 2d 957, 960 (9 Cir. 1975), cert. den. sub nom. *Gilmore* v. *Weyerhaeuser Co.,* —— U.S. —— (U.S. 75-1620, 10/4/76), hereinafter cited as *Gilmore,* and *Adkins,* 529 F. 2d, pp. 1084, 1088, fn. 4, that Section 2(3) "employee" status must be based solely on the work the injured person was doing at the time of his accident, and not on the work he generally or regularly or previously did.

Pennsylvania R. Co. v. *O'Rourke,* 344 U.S. 334, 341-342 (1953), holds that Section 3(a), 33 U.S.C. 903(a), "navigable waters" situs is determinative at the time of injury[8], and reaffirms, 344 U.S., p. 340, that the Section 2(2), 33

[8] In *Ford,* 539 F. 2d, p. 541, the Court held: "As with the 'maritime employment' test, we also interpret the Act as requiring that the situs meet the statutory requirements as of the time of the injury. It will not suffice if the area was so used only in the past, or if such uses are merely contemplated for the future."

U.S.C. 902(2), requirement that the injury arise "in the course of employment" and the Sections 2(3), 3(a)(1), 33 U.S.C. 902(3), 903(a)(1) exclusions of "member of a crew of any vessel" must also be determined at the time of injury, citing, inter alia, *Parker* v. *Motor Boat Sales*, 314 U.S. 244, 247 (1941), which rejected "habitual performance of other and different duties on land" as altering the fact that the employee's accident occurred on navigable waters, and *Long Island R. Co.* v. *Lowe*, 145 F. 2d 516, 518 (2 Cir. 1944), which held that: "The employee's duties on the day of the accident [and not other work he had done during his employment] are the critical facts which should determine his status as a member of the tug's crew."

It would be anomalous if Section 2(3) "employee" status were affirmatively established by what the worker generally did at other times, but he was excluded under Sections 2(3), 3(a)(1) because of the work he was doing when injured. The "significant part of his time in typical longshoring activity" and "bona fide membership in a class of employees whose members would for the most part have been covered some of the time under the earlier Act" criteria engrafted by the majority below and *Stockman* are practically indefinable and would generate more litigation and disparate, inequitable coverage than could be tolerated. How much time is "significant"? Is it time before or after the accident, or both? What about a new employee who has no "significant" prior work time and is too disabled to continue working?[7] What is "bona fide membership"? Is "for the most part have been covered some of the time" susceptible to any uniform meaning? And why should compensable

[7] *Stockman* seemingly attempts to hedge against this difficulty by limiting its decision to "a steadily employed longshoreman", 539 F. 2d, p. 275, whatever that may mean.

status depend on coverage under "the earlier Act" when the 1972 Amendments were indisputably intended to expand the former coverage?

Language, logic, case law, and common sense combine to dictate that compensable status of all employees—new and old, typical and atypical, steady and casual, bona fide members and non-members—can best and should be determined by the work the injured employee was doing (or had been assigned to do) when he was hurt.

II

Caputo's status is not compensable because he was not unloading a ship.

The next question is whether Section 2(3), 33 U.S.C. 902(3), "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations" necessitates that the employee be unloading (or loading) a ship when injured. Again, there is no explicit answer in the Act or legislative history. As stated by the majority below (Pet. 9a): "The problem with which we are here concerned arises from Congress' failure to supply any definition of two terms in § 902(3)—'engaged in maritime employment' and 'any longshoreman or other person engaged in longshoring operations'."[8]

[8] Although the majority below held that Congress intended to cover "workers injured while engaged in the process of loading or unloading ships" (Pet. 41a) and noted that Caputo "was injured while helping a cargo consignee's truckdriver load boxes of cheese * * * inside the consignee's truck" (Pet. 11a), the majority did not decide whether "the process of unloading a vessel continues until the cargo is deposited on the consignee's truck" (Pet. 22a) and refused to make a "wholly artificial" distinction between the job of the forklift operator who moved the cheese from the terminal warehouse to the truck who, the majority conceived,

[con't p. 12]

Despite professed inability "to construct a 'hazard' test" (Pet. 41a), the majority below acknowledged the significance of Congress' concern for the "extraordinary hazards" of longshoring (Pet. 40a), in contradistinction to "the work [Caputo] was doing when injured [which] was the same work with the same risk factor as would obtain wherever and by whomsoever trucks were loaded or unloaded with a dolly" (Pet. 54a). That congressional concern is evinced by "load or unload" and "loading, unloading" in the Sections 2(3), 2(4) definitions and Section 3(a) coverage and, more significantly, in the Committee Reports, S.Rep. 92-1125, p. 13; H.R.Rep. 92-1441, p. 11:

> "The Committee does not intend to cover employees who are not engaged in loading, unloading • • • a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment."

As a "typical example" of the kind of function which Congress intended to cover by the expansive Amendments, the Reports state, *ibid.*, that:

> " • • • cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area."

"clearly would have been engaged in 'unloading' in the way that term is used in ordinary speech" and Caputo's job inside the truck (Pet. 39a).

Applied to the facts of this case, the Reports make it at least reasonably evident, if not indisputably clear that the longshoremen on the ship who discharged the cheese, and the longshoremen on the pier adjoining the ship who landed the cheese, and the forklift operators who "immediately transported" the cheese to the terminal warehouse, "a storage or holding area on the pier"[9], were all covered by the amended Act, and that the forklift operators who "pick[ed] up" the "stored cargo" of cheese from the terminal warehouse and brought it alongside the truck and lifted it into the truck "for further trans-shipment would not be covered"[10] nor, *ipso facto*, would truck loader Caputo.

In *Adkins*, a majority of the Court determined that injury to a forklift operator while he was moving cargo from a terminal warehouse 685 feet from the water, where the cargo had been stored 4 days awaiting pick up by the consignee, to the consignee's truck, was not covered by the

[9] The majority below, contrary to the Administrative Law Judge's finding that the cheese "had been stored on the terminal's premises awaiting the arrival of the consignee" (Pet. 52a), did not regard the cheese "as 'stored' within the committees' meaning simply because the consignee had delayed five days in picking it up" (Pet. 39a) and suggested, contrary to the Committees' broader designation of *"storage or holding* area on the pier, wharf, or terminal", that cargo was not "stored" unless "placed in a public warehouse" (Pet. 39a, fn. 24).

[10] "Transshipment contemplates a significant, identifiable change in the nature, the mode and the conveyance used in the carriage of cargo." *Port Royal Marine Corporation* v. *United States*, 378 F. Supp. 345, 352 (S.D.Ga. 1974), aff'd 420 U.S. 901 (1975).

Act, 529 F. 2d, pp. 1082, 1088. The majority held that although Adkins "performed a function in the overall unloading of the ship", 529 F. 2d, p. 1082, because "maritime employment" "embodies the concept of a direct relation to a vessel's navigation and commerce", 529 F. 2d, p. 1084; cf., *Gilmore,* 528 F. 2d, p. 961, and because "To the extent pertinent here, the 1972 Amendments were a direct response to the invitation in *Nacirema*" [11], 529 F. 2d, p. 1086, and because the legislative history further confirmed that "employees not engaged in loading or unloading a vessel were *not* to be covered even if they were injured on land in an area used for such activity", 529 F. 2d, p. 1087, "the Act applies between the ship and, in the case of unloading, the *first* storage or holding area on the pier, wharf, or terminal adjoining navigable waters", 529 F. 2d, p. 1087, known to the industry as the "point of rest", 529 F. 2d, pp. 1087, 1088. "Since Adkins was injured landward of the first point of rest • • • we think it follows that [he was not] afforded coverage under the Act, as amended. • • • with respect to longshoremen or other persons engaged in longshoring operations, the Amendments extend only to those employees engaged in loading and unloading activities between the ship and the first (last) point of rest, including checkers 'directly involved in [such] loading or unloading functions.' ", 529 F. 2d, p. 1088. Judge Craven dissented, *inter alia,* on the ground that since Adkins was engaged in the overall process of unloading, he was subjected to the covered risks inherent in moving cargo, 529 F. 2d, pp. 1100-1101. On rehearing in banc, Judge Widener joined the

[11] "There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. • • • The invitation to move that [coverage] line landward must be addressed to Congress, not to this Court." *Nacirema Operating Co.* v. *Johnson,* 396 U.S. 212, 223-224 (1969).

majority in affirming that Adkins' injury was not covered by the Act because: "The cargo was no longer being unloaded from the ship but was in the process of being loaded into a delivery truck. Adkins • • • was thus not covered because he was not participating in the unloading process; he was handling the goods for transshipment.", 542 F. 2d, p. 905.

Judge Widener's common sense analysis of Adkins' function commends itself to Caputo's. It distorts everyday language beyond meaningful usage to say that a person loading a truck is unloading a ship several days after the ship has sailed or, as in the *Ford* case, that a person stacking bales in a storage warehouse, 539 F. 2d, p. 544, is "directly involved", 539 F. 2d, pp. 539-540, 541, fn. 21, in loading a ship several days before the ship arrives.[12]

[12] "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew." *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, 96 (1946). Ancient mariners did not leave some of the crew behind to load drays, or send some of them ahead to stack freight. Borrowing from a Judge Lumbard dissent approvingly quoted in *United Pilots Ass'n* v. *Halecki,* 358 U.S. 613, 618 (1959), Caputo "was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed." By I.C.C. definition, he was a truck loader. *Levinson* v. *Spector Motor Co.,* 330 U.S. 649, 652 (1947). In the Port of New York, until World War I consignees' truckmen loaded their own trucks, and thereafter until 1954 the trucks were loaded by public loaders. *Truck Loading and Unloading Rates at New York Harbor,* 13 F.M.C. 51, 53-54 (1969).

III

Caputo was not "engaged in maritime employment" because the freight he was truck-loading was not in maritime commerce.

Even if in his *Adkins* dissent, 529 F. 2d, p. 1090, Judge Craven correctly analyzed that Section 2(3), 33 U.S.C. 902(3) "engaged in maritime employment" generically makes it unnecessary that the injured employee be loading or unloading a ship, it boggles the mind to conceive that a workman handling freight which is not in maritime commerce is nevertheless engaged in maritime employment."[18] In *Johns,* where the issue was the compensability of an injury to a shuttle driver who moved freight from one marine terminal to another, 540 F. 2d, p. 632, the Court discerned that the Act's jurisdictional limits "depend on the presence of a nexus between the employer-employee relationship and maritime commerce", 540 F. 2d, p. 636, and that:

"• • • the overall intention [of the 1972 Amendments] appears to be to afford federal coverage to all those employees engaged in handling cargo after it has been delivered from another mode of transportation for the

[18] It is perhaps no less disturbing to envision a workman injured while engaged in maritime employment who, unless traumatized by a ship's appurtenance, did not suffer a maritime tort. *Industrial Comm.* v. *Nordenholt Co.*, 259 U.S. 263, 272-273 (1922); *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 210 (1971), reh. den. 404 U.S. 1064 (1972); *Vizciano* v. *Industrial Export Lines*, 1974 A.M.C. 1196, 1197 (S.D.N.Y. 1974). "The 1972 amended prerequisite of 'maritime employment' is a clearly expressed congressional perpetuation of the essential element of admiralty jurisdiction over the employee. In other words, the fixed federal compensation is provided in lieu of the uncertainty of a recovery by an injured ship worker for a maritime tort." *Gilmore*, 528 F. 2d, p. 961; cf., Pet. 31a-32a, fn. 18.

purpose of loading it aboard a vessel, and to all those employees engaged in discharging cargo from a vessel up to the time it has been delivered to a place where the next mode of transportation will pick it up. A stevedore may receive cargo • • • for delivery to a truck or rail carrier. The limits of federal coverage is defined • • • by the location of the interface between the air land and the water modes of transportation. • • • The key is the functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking, railroading or warehousing. • • • The line which Congress intended to draw was between maritime commerce and land commerce, and the coverage of the federal law starts at the point where the cargo passes to or from an employer engaged in the former to an employer engaged in the latter. • • • The line should be drawn where cargo is delivered to a segregated place for delivery to the next mode of transportation.

We note that defining the scope of federal workmen's compensation coverage in this manner is consistent with the provisions of the Harter Act, 46 U.S.C. § 193, and the Carriage of Goods by Sea Act, 46 U.S.C. § 1303 (3), defining the point at which the responsibility of the maritime carrier begins. While these statutes do not tell us what the Ninety-Second Congress had in mind when it passed the [Longshoremen's and Harbor Workers' Compensation Act] amendments, there is some virtue in a construction of the latter statute that produces consistency with other enactments relating to maritime commerce.", 540 F. 2d, pp. 638, 639.

The Carriage of Goods by Sea Act, 49 Stat. 1208, 1212, 46 U.S.C. 1301(e), 1311, is applicable "from the time when

the goods are loaded on to the time when they are discharged from the ship", and, with respect to discharged cargo, the Harter Act, 27 Stat. 445, 46 U.S.C. 190, 191, applies until "delivery" of the cargo. To make "delivery" and thereby terminate the maritime contract of carriage, the carrier is not required to place the cargo "into the possession of the consignee", *Richardson* v. *Goddard,* 64 U.S. (23 How.) 28, 39 (1859). Delivery is accomplished after discharge by giving "due and reasonable notice to the consignee" [14], *ibid.*, and making the cargo "conveniently accessible" for pick up by the consignee, *The Eddy,* 72 U.S. (5 Wall.) 481, 495 (1866), during a reasonable period, called "free time".[15]

In the Port of New York, for discharged break bulk cargo such as the boxes of cheese in this case, the "free time" is generally five business days, New York Terminal Conference Port of New York Marine Terminal Tariff No. 2, F.M.C.—TNo. 16 (filed 9/1/75) p. 16, and "conveniently accessible" means putting the cargo on the ground alongside the tailgate of the consignee's truck, *Truck Loading and Unloading Rates at New York Harbor,* 13 F.M.C. 51, 62 (1969). The carrier is not required or expected to load or

[14] Notice of cargo availability is unnecessary in the Port of New York. "Consignees are universally apprised of the arrival of vessels and routinely inform themselves by telephone, messenger, or reference to shipping publications, as to the availability of their cargoes • • •." *Free Time and Demurrage Charges at New York,* 3 U.S.M.C. 89, 106 (1948).

[15] Free time "is a period which is covered by the rates for the ocean transportation and which is allowed for the removal of the property from pier after its discharge from vessel." *Free Time and Demurrage Charges at New York,* 3 U.S.M.C., p. 91, fn. 5; *California* v. *United States,* 46 F. Supp. 474, 476 (N.D. Cal. 1942), aff'd 320 U.S. 577 (1944), reh. den. 321 U.S. 802 (1944).

help load the consignee's truck.[16] "We agree that this would be a new concept in the industry. • • • we are not suggesting such a requirement. • • • We are not requiring the carrier to load or to provide labor for loading [a consignee's truck]", *ibid.,* 13 F.M.C., pp. 63-64.

If the consignee does not take "delivery" (i.e., pick up accessible cargo before expiration of the free time) the maritime contract ends and the goods thereby cease to be in maritime commerce, *Richardson* v. *Goddard, supra,* 64 U.S., p. 39; *The Eddy, supra,* 72 U.S., p. 495; *Calcot, Ltd.* v. *Isbrandtsen Co.,* 318 F. 2d 669, 673 (1 Cir. 1963); *Leather's Best, Inc.* v. *S.S. Mormaclynx,* 451 F. 2d 800, 807, fn. 5 (2 Cir. 1971). The terminal operator is then deemed to have accepted delivery on behalf of the consignee and may charge the consignee demurrage[17] and/or put the goods in public storage at the sole risk and expense of the consignee and, if the goods remain on the terminal more than 30 days, sell them for collection of demurrage charges. New York Terminal Conference (etc.) Tariff No. 2, *supra,* pp. 16, 18.

Thus, as explicated by Judge Prettyman in *American President Lines, Ltd.* v. *Federal Maritime Board,* 317 F. 2d 887 (D.C. Cir. 1962):

> "Ships bringing transoceanic freight into port are required by their transportation obligation, absent a

[16] In the Port of New York, truck loading is usually done by employees of terminal operators, such as petitioner Northeast, who are members of the New York Terminal Conference, "with the assistance, and under the supervision, of the driver of the truck" and at the expense of the consignee or its trucker. New York Terminal Conference (etc.) Tariff No. 2, *supra,* pp. 21-23.

[17] Demurrage is a "charge assessed against cargo remaining in or on the terminal facilities after the expiration of free time.", New York Terminal Conference (etc.) Tariff No. 2, *supra,* p. 16.

special contract, to unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee, and afford the consignee a reasonable opportunity to come and get it. This was settled by the courts many years ago. [footnote citations omitted.] Circuit Judge Goodrich stated, in North American Smelting Co. v. Moller S. S. Co., [204 F.2d 384, 386 (3 Cir. 1953), that 'There is no doubt that in discharging the cargo onto the pier and notifying the consignee the carrier was no longer in possession of the goods so as to suffer the risk of loss not due to any negligence on its part.' The work of unloading and putting the cargo on the dock is done on behalf of the carrier by longshoremen, who are laborers skilled in this sort of thing, or by stevedoring companies under contract with the carriers, these stevedores employing longshoremen. There is not now, and does not appear ever to have been, absent a special contract, any obligation on the part of the carriers to put such cargo actually into the hands of consignees, as by putting it into trucks and hauling it to the consignees' places of business. Consignees are obligated, after notice and reasonable opportunity, to come and pick up their goods at the pier. 317 F.2d, p. 888.

• • • •

In the industry concerned in this case there seems to us to be no room for dispute over the nature of the obligation of the carrier. It tenders for delivery; it does not deliver. It makes a valid and complete tender when it puts the cargo on the dock, reasonably accessible, properly segregated and marked, and leaves

it there for five days; with notice, of course. 317 F.2d, p. 889.

• • • •

The Board's position, as made clear by its brief and argument here, is that the legal duty of the carrier to deliver continues until the consignee calls for the cargo; that even after free time has expired the carrier has the duty of making the cargo physically available to the consignee's trucks; and that the carrier must provide the labor to load the consignee's trucks. A longshore strike, the Board says, prevents the carrier from fulfilling this obligation. This is a violent shift from the provisions of General Order 69 and introduces a new concept into the industry. A carrier does not, as we have pointed out, under long-established customs and official rules, deliver goods to consignees; it tenders them for delivery, makes them available for delivery. 317 F.2d, pp. 890-891.

• • • •

For the foregoing reasons the order entered by the Board on December 15, 1960, in Docket No. 859, Free Time and Demurrage Charges—New York, is set aside as invalid and the matter is remanded to the Board for further proceedings in accordance with this opinion." 317 F.2d, p. 891.

Caputo was not a "longshoreman injured while doing the ship's work", *Seas Shipping Co.* v. *Sieracki, supra,* 328 U.S., p. 89. He was a truck loader of freight which was no longer in maritime commerce and he therefore was not "engaged in maritime employment".

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the court below in this case should be reversed.

Respectfully submitted,

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New York, N.Y.
January 21, 1977

APPENDIX

APPENDIX

Following are Sections 2(3), 2(4), and 3(a) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 1426, as amended in 1972, 86 Stat. 1251, 33 U.S.C. 902(3), 902(4), 903(a). The pre-1972 language which the Amendments eliminated is enclosed in black brackets; the new language which the Amendments added is printed in italics; and the pre-1972 language which the Amendments left unchanged is printed in roman.

DEFINITIONS

SEC. 2. When used in this Act—

(3) The term "employee" *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, but such term* does not include a master or member of a crew of any vessel, [nor] *or* any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States [(including any dry dock)] (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*).

COVERAGE

SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States [(including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law] (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*). No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, [nor] *or* any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

Following is the identical portion of the Senate and House Reports, S.Rep. No. 92-1125, 92d Cong., 2d Sess., pp. 12-13; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., pp. 10-11, 1972 U.S. Code Cong. and Adm. News, vol. 3, pp. 4707-4708, entitled "Extension of Coverage to Shoreside Areas":

The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge;

injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages. The following are the maximum limits on the compensation payable for permanent total disability in some maritime States:

California	$70.00
Florida	56.00
Hawaii	112.50
Louisiana	49.00
Maryland	85.68
Massachusetts	[1] 77.00
New Jersey	101.00
New York	80.00
Oregon	62.50
Pennsylvania	60.00
Texas	49.00

Also, under the laws of some states due to exemptions based upon the number of employees hired some workers might be uncovered in the event they are unfortunate victim of an injury.

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[1] Plus $6 for each dependent.

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable

waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

Supreme Court, U. S.
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Nos. 76-444 and 76-454

In the Supreme Court of the United States

OCTOBER TERM, 1976

NORTHEAST MARINE TERMINAL COMPANY, INC., AND STATE INSURANCE FUND, PETITIONERS

v.

RALPH CAPUTO AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

INTERNATIONAL TERMINAL OPERATING CO., INC., PETITIONER

v.

CARMELO BLUNDO AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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INTERNATIONAL TERMINAL OPERATING CO., INC., PETITIONER

v.

CARMELO BLUNDO AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (I.T.O. Pet. App. 1a–44a–2)[1] is reported at 544 F. 2d 35. The Bene-

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[1] "I.T.O. Pet. App." refers to the separately bound appendix to the petition in No. 76-454. "Northeast Marine Pet. App." refers to the appendix to the petition in No. 76-444.

fits Review Board's decision in No. 76-444 (Northeast Marine Pet. App. 47a–50a) is reported at 3 BRBS 13.[2] The administrative law judge's decision in that case (Northeast Marine Pet. App. 51a–55a) is not reported; a synopsis of it appears at 2 BRBS 4 (ALJ). The Benefits Review Board's decision in No. 76-454 (I.T.O. Pet. App. 45a–48a) is reported at 2 BRBS 376. The administrative law judge's decision in that case (I.T.O. Pet. App. 49a–59a) is not reported; a synopsis of it appears at 1 BRBS 71 (ALJ).

JURISDICTION

The judgment of the court of appeals (Northeast Marine Pet. App. 56a–58a) was entered on July 1, 1976. A petition for rehearing in No. 76-444 was denied on September 3, 1976 (Northeast Marine Pet. App. 59a–60a). The petition for a writ of certiorari in No. 76-444 was filed on September 27, 1976, and in No. 76-454 on September 28, 1976. The petitions were granted and the cases were consolidated on December 6, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Longshoremen's and Harbor Workers' Compensation Act applies to persons injured on land while handling cargo, after that cargo has been unloaded from the vessel but before it has

[2] The Benefits Review Board Service, published by Matthew Bender & Co., is the unofficial reporter of the Board's decisions.

been finally received by the consignee for overland carriage.

2. Whether the Act covers injuries occurring within portions of a maritime facility that are not being used for the transfer of cargo between a vessel and the pier or wharf.

STATUTE INVOLVED

1. Prior to its amendment in 1972, the Longshoremen's and Harbor Workers' Compensation Act provided in relevant part:

Section 2(3), 44 Stat. 1425, 33 U.S.C. 902(3):

> The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 44 Stat. 1425, 33 U.S.C. 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

Section 3(a), 44 Stat. 1426, 33 U.S.C. 903(a):

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

2. As amended by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86

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Stat. 1251 *et seq.*, the Act now provides in relevant part:

Section 2(3), 86 Stat. 1251, 33 U.S.C. (Supp. V) 902(3):

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 86 Stat. 1251, 33 U.S.C. (Supp. V) 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a), 86 Stat. 1251, 33 U.S.C. (Supp. V) 903(a):

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

STATEMENT

1. Ralph Caputo has been a longshoreman since 1947 (A. 9). He was a member of a regular stevedoring "gang" that worked steadily for Pittston Stevedoring Co.; sometimes Caputo worked as a "dock man" handling cargo on a pier next to a ship, and sometimes he worked as a "hold man" stowing cargo on a vessel or breaking it out of a ship's holds (A. 8–10). When Pittston had no work for Caputo's regular "gang" he went to the waterfront hiring hall, where he was hired by the day (A. 10). On some occasions he was hired by Northeast Stevedore Co. to do work as a member of a stevedore "gang"; on other occasions he was hired by Northeast Marine Terminal Co. for work in its terminal operations. In either case he reported to the same timekeeper at Northeast's terminal (A. 14–16, 22–23).

On April 16, 1973, the hiring hall sent Caputo to Northeast's terminal to work as a "terminal laborer" (A. 14). "Terminal labor" and work in a stevedoring "gang" are the two standard assignments of longshoremen who handle cargo in its movement between a vessel and the pier, and across a pier or terminal to consignees or from shippers.[3] Caputo was assigned to help load consignees' trucks with cargo that had been unloaded from ships at Northeast's terminal. While backing into a consignee's truck with a dolly loaded

[3] Longshoremen less frequently are assigned to the "ship's labor" tasks, which include taking laundry and ships' stores aboard for the crew. Caputo had been assigned such tasks on occasion (A. 8, 24–25).

with cases of cargo that had been discharged from a vessel some five days earlier, Caputo tripped over an obstruction and injured his foot; he was unable to return to work until May 7, 1973 (A. 4–6, 27–29).

The administrative law judge (*Northeast Marine* Pet. App. 51a–55a) and the Benefits Review Board (*id. at* 47a–50a) concluded that Caputo was an "employee" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act and held that he was entitled to compensation. Both the administrative law judge and the Board relied on the Board's earlier decision in *Avvento* v. *Hellenic Lines, Ltd.*, 1 BRBS 174.

Avvento held that an employee injured while loading cargo into a consignee's truck was covered by the Act. The Board reasoned that the employee was engaged in maritime employment because he was performing the last of a series of operations necessary to transfer the ship's cargo from its hold to a land carrier; the employee therefore met the "status" test established by Section 2(3) of the Act. The Board also concluded that the employee met the "situs" test established by Section 3(a) of the Act because the injury occurred in a terminal customarily used to unload vessels and to transfer possession of their cargo.

The Board declined the invitation of petitioner Northeast to overrule *Avvento*. It also declined Northeast's request to hold that Caputo's employment had lost its maritime character because the cargo had been

transferred from the vessel to the terminal five days before Caputo loaded it into the consignee's truck (Northeast Marine Pet. App. 48a–49a).

2. Carmelo Blundo worked as a checker for International Terminal Operating Co. (I.T.O.) for five years (A. 60–61). Blundo usually worked at the 21st Street Pier in Brooklyn, New York; the pier extends approximately 700 feet back from the water's edge and is approximately 1000 feet wide (A. 62, 75). It is enclosed by a fence, and two guarded gates control traffic to and fro (A. 63). On the seaward end of the pier there are finger piers, which can accommodate five ships for loading or unloading (A. 64).

The side of the pier closest to 21st Street was used to load and unload ships; the side closest to 19th Street was used to strip containers of cargo that had been transported there after being unloaded from ships at another pier (A. 94–96).[4] Petitioner I.T.O.

[4] Containers are large metal boxes resembling truck trailers but having no wheels (A. 101). They are used to carry large amounts of cargo that otherwise would require strapping to pallets. A container may carry goods for a single consignee, or it may be shared by goods of several consignees; if it carries goods for a single consignee it may be removed from the pier intact in certain circumstances, but if it carries goods for more than one consignee it usually is "stripped" of its contents, and the contents are reassembled by consignee (A. 86–89, 96–98, 102–103, 105–107). Containers may be loaded onto ships (or removed from them) more quickly than break bulk cargo. The secure stowing or breaking out of cargo, formerly performed in the ship's hold, now may be done on shore in stuffing and stripping the containers, so that the time ships spend in port is reduced (I.T.O. Pet. App. 34a–37a). See generally National Association of Stevedores Br. 27–31.

also loaded and unloaded lighters[5] at the 21st Street pier (A. 115).

Blundo, as a checker, performed several types of tasks for petitioner I.T.O. Approximately 20 percent of the time he worked aboard vessels or lighters checking cargo against the manifests or bills of lading (A. 67). Checkers also worked on the pier alongside the water (A. 116) and inside the terminal. Blundo was assigned his tasks at the beginning of each day, and until he arrived at the terminal he did not know which tasks he would perform. He was reassigned during the day if he completed the tasks to which he initially was assigned (A. 68–69, 115–117, 123).

On January 8, 1974, I.T.O. assigned Blundo to check cargo being stripped (removed) from a container on the 19th Street side of the pier, and 30 to 40 feet from the water's edge (A. 65, 69). The cargo was then to be placed in a special warehouse pending customs inspection (A. 69). As he attempted to mark a pallet of cargo being taken from the container, Blundo slipped on ice that had accumulated on the pier (A. 74). He was disabled until April 16, 1974 (A. 59).

The administrative law judge (I.T.O. Pet. App. 49a–59a) and the Benefits Review Board (*id.* at 45a–48a) concluded that Blundo's injury was covered by the Act. The Board held that the stripping of containers on the waterfront is a "longshoring

[5] Lighters are covered barges (A. 8), usually used to transport cargo to and from ships moored in the harbor or in open water.

operation" and a "part of the over-all process of unloading a vessel" (*id.* at 47a); Blundo therefore was injured while engaged in "maritime employment" within the meaning of Section 2(3) of the Act. The Board also held that the entire 21st Street Pier was a "terminal" adjoining the water and customarily used by I.T.O. in the process of loading and unloading vessels (*id.* at 48a); Blundo therefore was injured at a place with the maritime situs required by Section 3(a) of the Act.

3. Petitions for review in both cases were consolidated by the court of appeals, which upheld the awards of compensation (I.T.O. Pet. App. 1a–44a).[6]

The court found "no question that claimants met the situs test" of Section 3(a) (I.T.O. Pet. App. 30a and n. 19), concluding that any pier or terminal next to the water is within the situs definition. The court also held that both Caputo and Blundo were engaged in "maritime employment," within the meaning of Section 2(3), when they were injured (*id.* at 31a–40a).

The court concluded that all persons performing traditional tasks of longshoremen (including stuffing and

[6] The court questioned whether the Director, Office of Workers' Compensation Programs, the federal respondent here, was a proper party in the court of appeals (I.T.O. Pet. App. 12a–14a n. 5). It concluded that some federal participation was proper, however, and therefore did not reach the question whether the Benefits Review Board itself should have been substituted for the Director. Petitioners themselves named the Director rather than the Board as a respondent in the court of appeals, and they have not presented in their petitions for writs of certiorari any question concerning the identity of the proper federal party. The question therefore is not before the Court in this case.

stripping of containers, the functional equivalent of these tasks) are engaged in maritime employment, whether or not the persons are "longshoremen." Because longshoremen traditionally have assembled cargo for shipment and, after cargo is removed from a ship, made it available for consignees, Blundo was covered by the Act. The court thought that Caputo was differently situated, but it upheld the award to him on the ground that he was a "longshoreman" whether or not, at the moment of the injury, he was engaged in traditional longshoring tasks.

In other words, the court of appeals concluded that a person is engaged in "maritime employment" whenever he is employed as a longshoreman (whether or not engaged in longshoring operations) when injured, or when he is engaged in longshoring operations (whether or not a "longshoreman") when injured. The court reserved any questions that might be presented by work other than stuffing, stripping or checking that was seemingly maritime in nature but not performed by a "longshoreman." It summarized its holding as follows (I.T.O. Pet. App. 39a–40a):

> We therefore hold that the Amendments at least cover all persons meeting the situs requirements (1) who are engaged in stripping or stuffing containers or (2) are engaged in the handling of cargo up to the point where the consignee has actually begun its movement from the pier (or in the case of loading, from the time when the consignee [*sic;* consignor] has stopped his vehicle at the pier), provided in the latter instances that the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel. That is as far as we need to go to affirm Blundo's and Caputo's awards; whether the proviso is essential can be left for another day.

SUMMARY OF ARGUMENT

I

All physical cargo handling activity within an area meeting the situs requirement of Section 3(a) of the Act also satisfies the employment status requirement of Section 2(3). The Act therefore covers all persons who remove cargo from a ship, transfer it, check it, load or unload containers, and place cargo in the possession of an overland carrier. Any person who engages in the risky task of cargo handling on the waterfront not only is engaged in longshoring operations within the meaning of Section 2(3), but also is engaged in "maritime employment," whether or not his job properly may be called "longshoreman."

The Act covers persons on the basis of their occupations, not on the basis of what they may be doing when injured. It uses "maritime employment" and "longshoremen" in a broad sense, to include all waterfront tasks related to the transportation of goods by water. This Court has used the term "longshoreman" in the same way (*Victory Carriers, Inc.* v. *Law,* 404 U.S. 202), and other courts also have recognized that longshoring operations include most varieties of physical endeavor involved in moving cargo between land and water transportation.

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Any ambiguity in the statute should be resolved in favor of coverage. The Act is a remedial statute and must be liberally construed (*Voris* v. *Eikel,* 346 U.S. 328, 333). The amendments at issue here were intended to put an end to the phenomenon of shifting coverage that caused waterfront workers to walk in and out of federal coverage from day to day or even within a single day. Although adoption of petitioners' "point of rest" line would end the problem of shifting coverage for some workers, it would create a new problem for others whose daily work carries them from one side of the "point of rest" to the other. The "point of rest" is itself elusive; how long an interruption in the movement of cargo between water and land transportation is enough to make a stopping point a "point of rest?"

The Benefits Review Board has concluded that no meaningful rule can divide the cargo-handling operations of a single waterfront area into covered and uncovered portions. That conclusion is entitled to deference, and the award of benefits in these cases should be upheld.

II

Respondent Blundo was injured at a maritime situs within the meaning of Section 3(a) of the Act. Blundo was injured in a terminal or pier adjoining navigable waters, and that alone is sufficient to establish a maritime situs.

Petitioner I.T.O. would divide a single waterside terminal into a number of areas, some having, and others lacking, the requisite maritime situs. Nothing could be more conducive to confusion. Unless every place within any waterfront facility devoted primarily to maritime activities is treated as a maritime situs for the purpose of Section 3(a), workers would walk in and out of federal coverage repeatedly within a working day. Indeed, even if the worker stayed in the same place, coverage might come and go as the workers around him engaged in different tasks. For example, under the argument of petitioner I.T.O., the place where Blundo was injured might be a maritime situs while a ship is at the pier, then lose that characteristic when the ship leaves.

Every "pier" or "terminal" adjoining the navigable waters is a maritime situs, whether or not the pier or terminal is used to load or unload ships. The requirement that a place be "customarily used by an employer in loading, unloading, repairing, or building a vessel" modifies only the statutory coverage of "other adjoining areas." The court of appeals therefore correctly held (I.T.O. Pet. App. 31a n. 19) that "any pier next to the water is included within the situs definition."

ARGUMENT

I

A PERSON IS ENGAGED IN "MARITIME EMPLOYMENT" WHENEVER HE IS WORKING WITH CARGO AFTER IT HAS BEEN REMOVED FROM A SHIP BUT BEFORE IT IS TRANSFERRED TO AN OVERLAND CARRIER FOR DELIVERY TO THE CONSIGNEE

A. THE STATUTE APPLIES TO ALL EMPLOYEES ENGAGED IN THE PROCESS OF HANDLING CARGO AT THE WATERFRONT

1. The Act distinguishes among different occupations but not among different tasks

The Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, provides that compensation under the Act shall be paid to all "employees" satisfying the employment "status" test of Section 2(3)[7] who are injured in places that satisfy the maritime "situs" test of Section 3(a).[8]

Section 2(3) provides that a worker is an "employee" satisfying the status test if he is a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations * * *." All persons engaged in "maritime employment" are covered. Congress did not leave

[7] Petitioners in No. 76–444 concede that they are "employers" within the meaning of Section 2(4) (Br. 3 n. 2), and petitioner I.T.O. never has disputed this. Their status as "employers" is controlled by whether any of their employees satisfy the status test of Section 2(3).

[8] The situs requirement is discussed at pages 44–49, *infra*.

that ambiguous term as the sole definition of the extent of coverage, however; Section 2(3) provides that any "longshoreman," and any "other person engaged in longshoring operations," are deemed to be engaged in the sort of maritime employment the statute describes.

There are, in other words, three ways for a cargo handler to meet the status test of Section 2(3): (1) he can be a "longshoreman" (whether or not he is engaged in longshoring operations); (2) he can be a person "engaged in longshoring operations" (whether or not he is a longshoreman); or (3) he can satisfy the broader generic description of "maritime employment" (whether or not he is a longshoreman or a person engaged in longshoring operations).[9]

[9] We do not discuss in this brief the other occupations that satisfy the status test. Section 2(3) provides that an employee includes any "harborworker including a ship repairman, shipbuilder, and shipbreaker * * *." The coverage of these occupations is discussed in *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533 (C.A. 5), petition for a writ of certiorari pending *sub nom. Halter Marine Fabricators, Inc.* v. *Nulty*, No. 76–880, and *Dravo Corp.* v. *Maxin*, 545 F. 2d 374 (C.A. 3), petition for a writ of certiorari pending, No. 76–1093. The Department of Labor believes that all persons within these occupations are covered by the Act, whether or not they are working on the navigable waters when injured.

The fact that "maritime employment" is a catch-all term rather than a limitation upon coverage is demonstrated by the inclusion of "any * * * shipbuilder" within the definition of "employee." Shipbuilding traditionally has not been thought of as maritime employment. *Grant Smith-Porter Ship Co.* v. *Rhode*, 257 U.S. 469. Congress used "maritime employment" in a lay sense, however, and defined its constituent parts in a lay sense as well. The coverage of the Act consequently is far broader than the definition of maritime employment used in the common law of admiralty.

The breadth of these coverage provisions deprives petitioners' arguments of much of their force. Although petitioners present a number of lengthy and complicated contentions, these are not difficult cases. The statute is short, and the pertinent legislative history not only is brief but also is the same in both houses of Congress. These cases are here at all only because the statute uses terms like "maritime employment" and "longshoring operations" that the legislative history does not flesh out.

But any ambiguities, far from favoring petitioners, must be resolved in favor of coverage. The Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris* v. *Eikel,* 346 U.S. 328, 333. "In the application of the act, therefore, the broadest ground it permits of should be taken," *De Bardeleben Coal Corp.* v. *Henderson,* 142 F. 2d 481, 484 (C.A. 5), quoted with approval in *Calbeck* v. *Travelers Insurance Co.,* 370 U.S. 114, 130.

There is a considerable area of agreement among the parties here. All agree that Congress intended to cover some shore-based workers. The petitioners (and the *amici* supporting them) concede that the Act applies to all employees moving cargo between the vessel and the first or last point of rest of that cargo on land, whether or not the employees engaged in that movement are or ever have been on a ship (I.T.O. Br. 9, 18–19, 33–43; Northeast Marine Br. 11–21; National Association of Stevedores Br. 5, 11–31; West Gulf Br.

7–10, 13–14). The respondents agree that the Act's coverage does not begin (when freight is arriving for shipment) until the cargo arrives by overland carrier at a waterfront pier or terminal satisfying the situs requirement of Section 3(a), and that the coverage ends when inbound cargo has been accepted by a consignee for overland carriage. The disagreement here concerns the coverage of employees who work on the waterfront moving, checking, and handling cargo.

The legislative history does not directly address the status of such persons. What little legislative history there is seems to look both ways. Both committee reports (H.R. Rep. No. 92–1441, 92d Cong., 2d Sess. 10–11 (1972); S. Rep. No. 92–1125, 92d Cong., 2d Sess. 13 (1972))[10] recite that "[t]he intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." This implies that what the employee was doing at the moment of injury is irrelevant to coverage, contrary to petitioners' arguments; it also seems to imply, however, that only persons who might have been covered for part of their activity before the 1972 amendments will be covered (for all of their activity) under the amended Act.

The committee reports state that "with the advent of modern cargo-handling techniques, such as con-

[10] The most pertinent portion of the committee reports is set out at Northeast Marine Br. App. ii–v.

tainerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore." H.R. Rep. No. 92–1441, *supra,* at 10; S. Rep. No. 92–1125, *supra,* at 13. This implies that the Act covers all of the physical tasks involved in unloading containers and transferring their contents to other modes of transportation, tasks that formerly were carried out in part aboard ship and in part close to the water; the Act therefore would cover workers like Blundo and Caputo.

This impression is fortified by the remark that "checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment." As we read this passage, the committees are stating that all checkers are "directly involved in the loading or unloading functions" at least some of the time and are consequently covered by the Act for all of their employment. Yet the committees also wrote that "employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered * * *." Does this mean, as petitioners contend, that persons who pick up cargo from the first point of rest for further movement are not covered? Or does it mean, as the Benefits Review Board concluded in these cases and many others, only that persons who pick up cargo from the marine terminal or the harborside for land transportation are not covered?

Professors Gilmore and Black have concluded that "[t]he Reports do not read as if they had been divinely inspired. As essays in statutory construction,

they do not commend themselves." [11] We agree that the legislative history is not radiantly clear. Although we have cited passages that appear to support the position of the Benefits Review Board and the Director in these cases, petitioners have construed them, and similar passages, to support their own position.[12] The

[11] Gilmore and Black, *The Law of Admiralty* 430 (2d ed. 1975).

[12] The committee reports set out a "typical example" of the shoreside work that would be covered by the amended Act. S. Rep. No. 92–1125, *supra*, at 13; H.R. Rep. No. 92–1441, *supra*, at 11; Northeast Marine Br. App. iv–v. Petitioners argue that this example demonstrates that the Act covers only those longshoremen and other persons involved in the handling of cargo between the ship and the first (or last) "point of rest" (Northeast Marine Br. 12–13; I.T.O. Br. 21–22; National Association of Stevedores Br. 9–10). We submit, however, that the "typical example" stands for the following propositions: (1) all persons engaged in the immediate transfer of cargo between the ship and a storage or holding area on the pier are covered; (2) persons are not covered just because they are injured in an area adjoining the navigable waters; (3) employees whose only responsibility is to pick up cargo for further shipment by land transportation are not covered; (4) purely clerical employees are not covered; and (5) checkers, who are directly involved in loading and unloading functions, are covered. The "typical example" does not support the narrow reading of Section 2(3) proposed by petitioners.

Petitioners read the reference to "employees whose responsibility is only to pick up stored cargo" to include longshoremen who are assigned to handle cargo shoreward of the "point of rest." This is a strained reading. The committees used "pick up" as an antonym to "deliver," not as an antonym to "put down." This is thus only a reference to the fact that the Act does not cover, for example, a truck driver whose presence at the pier or terminal is only for the purpose of picking up (or delivering) cargo.

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statute, however, must be read not only in light of its ambivalent legislative history but also in light of the reasons that prompted Congress to enact it, and in light of the consequences that would follow from adoption of petitioners' interpretation. We submit that there is ample support for the reasoned interpretation of the Act that has been adopted by the Benefits Review Board and the Director of the Office of Workers' Compensation Programs.

The position of the Board and the Director is that all physical cargo handling activity anywhere within an area meeting the situs requirements of Section 3(a) is "maritime employment" within the meaning of Section 2(3). The Act covers all persons who remove cargo from a ship, transfer it, check it, load or unload containers, and place cargo in the possession of a consignee (or the consignee's agent) for overland carriage. When cargo is arriving at the waterfront, the same principles apply; once the cargo has left the possession of the overland transporter, the Act covers all subsequent cargo handling activities until the cargo is safely aboard ship. Any person who participates in the risky task of cargo handling on the waterfront not only is engaged in longshoring operations, but also is engaged in maritime employment whether or not his job may properly be called "longshoreman" or his duties "longshoring operations." The Board, at the urging of the Director, has consistently taken this position since it was created by the 1972 amendments.[13]

[13] In addition to *Avvento*, *supra*, and the two cases here, see the Board decisions collected at I.T.O. Br. 40 n. 49. Decisions of the Board with respect to the coverage of persons similarly situated to Blundo and Caputo have been upheld by several courts of appeals. See note 15, *infra*.

The basic design of the 1972 amendments to the Act is clear. Congress intended to provide constant coverage, throughout the course of their employment, to workers whose occupations are "maritime" in the general sense that they are part of amphibious industries. With the single exception of the coverage of an "other person engaged in longshoring operations," Section 2 (3) includes workers on the basis of their occupations, not on the basis of the tasks they may be performing when injured.

"Maritime employment," "longshoreman," "shipbuilder," and so on define careers in which a worker may engage. A maritime worker therefore is covered by the Act as long as he is within the scope of his employment in that occupation, performing any of its tasks. In short, statutory coverage turns upon what the worker is, not upon what he is doing at the moment of injury.

Caputo was a typical longshoreman. He had been one for 26 years and worked in all of the categories of duties on the New York waterfront (see pages 5–6, *supra*). On the day of his injury he was on the waterfront, handling cargo that had been discharged from a vessel, making that cargo available for overland transportation. Blundo was a "checker," an occupa-

tion closely associated with that of longshoreman."[14] He worked alongside longshoremen; on the day of his injury, he was part of a crew removing cargo from a recently-arrived container.

Neither Blundo nor Caputo knew when he left for work in the morning whether he would be assigned to work aboard a ship or at shipside, or handling cargo inside the terminal. They knew only that their duties would pertain to the transfer of cargo between land transportation and a ship. They could be assigned by employers to a broad variety of waterfront tasks. What task they would be doing when injured was no less fortuitous, from their points of view, than whether they would be assigned to work on ships or ashore. The transfer of cargo between land and water transportation was the staple work of their occupations, and they were injured while taking part in that process. That is enough.

Blundo and Caputo either were "longshoremen" by occupation or were engaged in a continuous process of longshoring operations on the waterfront. Since both Blundo and Caputo are covered by the express terms of Section 2(3), it is unnecessary to consider whether

[14] Indeed, at the hearing before the administrative law judge, counsel for I.T.O. referred to the workers stripping containers as Blundo's "fellow longshoremen" (A. 88), and I.T.O.'s witness agreed that its workers engaged in stripping containers and loading cargo onto consignees' trucks were longshoremen (A. 112). Moreover, petitioner Northeast Marine has taken a position under which Blundo is a covered longshoreman (Br. 14–21).

they would satisfy the broader test of "maritime employment."[15]

[15] Scholars of the subject have, without exception, concluded that the Act's coverage is at least as broad as the Board has interpreted it to be. 1A *Benedict on Admiralty* §§ 16–19 (Jhirad rev. 1973); 4 Larson, *The Law of Workmen's Compensation* §§ 89.42–89.43 (1976); Watson, *Broadened Coverage Under the LHWCA*, 33 La. L. Rev. 683 (1973). Gilmore and Black have urged an even broader interpretation, under which "[t]he new statutory language can reasonably be read to mean that all persons who suffer employment-related injuries within the Act's expanded territorial limits are covered" (Gilmore and Black, *supra*, at 429; see also *id.* at §§ 6–45 to 6–51).

The courts of appeals, too, have endorsed the Board's test, although with differences in emphasis. The court of appeals in the instant case thought it unnecessary to consider whether an employee would be covered if he never had worked aboard a vessel.

The First Circuit, in *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F. 2d 264, petition for a writ of certiorari pending, No. 76–571, endorsed the Board's view in the context of an injury to a terminal worker who was "stripping" a container. It stated that "[m]uch of the loading and unloading that used to take place on or alongside the ship is presumably now reflected in the stuffing and stripping of containers" (539 F. 2d at 272), and it concluded that such cargo handling therefore must be taken as longshore work for the purpose of the statute. It rejected (*id.* at 274) the argument that coverage depends upon what the worker is doing at the moment of injury, and it held (*id.* at 277) that Congress did not exclude longshoremen from coverage just because their duties did not take them aboard ship.

The Third Circuit, in *Sea-Land Service, Inc.* v. *Director*, 540 F. 2d 629, took a different approach. It first analyzed the limits of the admiralty jurisdiction (540 F. 2d at 635–638) and concluded that Congress meant to exercise its full constitutional authority. It then stated that the "dominant purpose" of the 1972 amendments "was to make more uniform the death and disability compensation system for maritime employees so that maritime workers would no longer walk into federal coverage and out of state coverage, and vice versa, in the course of a day's work" (*id.*

(Continued)

2. *"Maritime employment" includes all physical tasks required to transfer cargo between land and water transportation*

Petitioner I.T.O. contends that Congress meant to cover only employment that was maritime in the sense

(Continued)

at 637). The court held that coverage should extend to all injuries arising out of commerce connected with vessels (*id.* at 638). See also *Maher Terminals, Inc.* v. *Farrell*, C.A. 3, No. 76-1145, decided January 17, 1977, slip op. 2 (coverage of the Act extends to all employees handling cargo "(1) after its delivery from another mode of transportation for the purpose of loading it aboard a vessel or (2) while it is in the process of being discharged from a vessel and before its delivery to the place where the next mode of transportation will pick it up"); *J. A. McCarthy, Inc.* v. *Bradshaw*, C.A. 3, Nos. 76-1146 *et al.*, decided January 4, 1977, affirming summarily *Bradshaw* v. *J. A. McCarthy, Inc.*, 3 BRBS 195 (terminal forklift maintenance mechanic), *Lind* v. *Independent Pier Co.*, 3 BRBS 232 (checker tallying export cargo being loaded aboard truck for transfer to another pier), *Parks* v. *Lavino Shipping Co.*, 3 BRBS 236 (checker tallying cargo in preparation for delivery to consignee), *Fairman* v. *J. A. McCarthy, Inc.*, 3 BRBS 239 (cooper repairing torn import cargo bags), *Muldowney* v. *Lavino Shipping Co.*, 3 BRBS 229 (checker "spotting" locations of cargo containers), and *Cabrera* v. *Maher Terminals, Inc.*, 3 BRBS 297 ("terminal labor" longshoreman loading imported cargo into consignee's truck).

The Fifth Circuit, in *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533, petitions for writs of certiorari pending *sub nom. P.C. Pfeiffer Co.* v. *Ford*, No. 76-641, *Halter Marine Fabricators, Inc.* v. *Nulty*, No. 76-880, and *Director* v. *Jacksonville Shipyards, Inc.*, No. 76-1166, has adopted the Board's position in most aspects. It concluded that a worker is a covered employee if he is engaged in any part of the cargo handling process up to the point where the cargo leaves a marine terminal. Under its views, Blundo and Caputo would be covered without regard to whether they ever had gone aboard ships. The Fifth Circuit held, however, that the workers must be engaged in the specified activity at the moment of injury (539 F.2d at 539-540), thereby adding one test to those adopted by the Board. The moment-of-injury test adopted by the

that the workers would pass back and forth between land and water.[16] We submit, to the contrary, that Congress used "maritime employment" in a far broader sense, to include all physical tasks performed on the waterfront, and particularly those tasks necessary to transfer cargo between land and water transportation. This is demonstrated by Congress' specific inclusion of "longshoremen" among those occupations to be covered by the Act; longshoremen traditionally have performed many tasks that do not require them to shuttle between land and water.[17] Congress knew this, and it used the term "longshoremen" to include

Fifth Circuit would not affect the disposition of the present cases, however, because Blundo and Caputo were engaged at the moment of injury in covered activities. See pages 36-42, *infra*.

The Fourth Circuit is badly divided. In *I.T.O. Corp. of Baltimore* v. *Benefits Review Board*, 529 F.2d 1080, modified on rehearing *en banc*, 542 F.2d 903, petitions for writs of certiorari pending *sub nom. Maritime Terminals, Inc.* v. *Brown*, No. 76-706, and *Adkins* v. *I.T.O. Corp. of Baltimore*, No. 76-730, a divided panel initially adopted a "point of rest" test under which the Act's coverage extended to cargo handling (on land or water) only during the movement between the vessel and the first (or last) "point of rest" on land. It made no difference whether the worker shuttled back and forth to a ship. On rehearing *en banc*, however, two judges adopted the Board's position, three judges adopted the "point of rest" test, and the sixth judge concluded that the Act covers certain cargo handling, within the terminal, shoreside of the point of rest. Thus, the court held four to two that a worker situated similarly to Caputo is not covered, and an equally divided court upheld awards of compensation to workers situated similarly to Blundo.

[16] See also West Gulf Br. 9-20.

[17] It is demonstrated, as well, by Congress' inclusion in the list of "maritime employment" of occupations that, at common law, would not have been maritime. See note 9, *supra*.

all workers employed at a waterfront facility handling and processing water-borne cargo.

Southern Pacific Co. v. *Jensen,* 244 U.S. 205, struck down an attempt by New York State to apply its workers' compensation program to longshoremen injured during their employment, where the injury took place on the navigable waters. The state statute involved in *Jensen* provided compensation for workers engaged in—

> [l]ongshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, *or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage.*

New York Laws of 1914, c. 41, § 2(10); emphasis added. This statute illustrates that the Board's interpretation of Section 2(3) is part of a long history of broad definitions of longshoring work in workers' compensation programs.

Such a conception of the work of the longshoreman was shared by Congress at the outset of the process that led to the passage of the Longshoremen's and Harbor Workers' Compensation Act in 1927. Congress originally attempted to authorize States to extend their own statutes to apply to maritime accidents, a

course it selected in part because (H.R. Rep. No. 639, 67th Cong., 2d Sess. 2 (1922); emphasis added):[18]

> The work of longshoremen is not all on ship. Much of it is on the wharves. They may be at one moment unloading a dray or a railroad car or moving articles from one point on the dock to another, the next actually engaged in the process of loading or unloading cargo. *Their need for uniformity is one law to cover their whole employment, whether directly part of the process of loading or unloading a ship or not.*

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[18] This report accompanied the bill that was eventually enacted as the Act of June 10, 1922, 42 Stat. 634, and held unconstitutional in *Washington* v. *W. C. Dawson & Co.*, 264 U.S. 219. See also Hearings on S. 3170 before a Subcommittee of the Senate Committee on the Judiciary, 69th Cong., 1st Sess. 40 (1927) (Statement of L. B. Clark, United States Bureau of Labor Statistics): "[T]he original endeavor in amending the judiciary act was to give the States control of the whole situation, the whole contract—the man on the dock, the man on the ship, the man on the bridge, or on the ladder or hanging in between."

As Judge Prettyman observed in *American President Lines, Ltd.* v. *Federal Maritime Board*, 317 F. 2d 887, 889 (C.A.D.C.), a maritime cargo carrier is obligated—as are the master stevedores and terminal operators who contract with such carriers—to put "the cargo on the dock, reasonably accessible, properly segregated and marked * * *." In order to carry out this obligation, longshoremen are employed in a variety of tasks, which are illustrated in the instant cases. Petitioner Northeast Marine agrees with this analysis (see, *e.g.*, Br. 18–19), and under Northeast's analysis respondent Blundo would be covered by Section 2(3).

Recent judicial decisions, too, have recognized that the traditional work of longshoremen may involve more than the simple loading or unloading of ships.[19] See *International Container Transport Corp.* v. *New York Shipping Association,* 426 F. 2d 884, 886 (C.A. 2):

> Historically the work of longshoremen included the preparation of cargo for shipment by making up, for example, drafts and pallets and, in connection with unloading cargo, the breaking up of drafts and pallets, sorting the cargo according to its consignees and delivering it to the trucks or other carriers.

The work of stuffing and stripping containers has replaced the work of making up and breaking up of pallets and drafts; it therefore was reasonable for the Board to conclude that this work is a maritime activity.

Petitioners would read "longshoremen" and "maritime employment" in the most narrow conceivable way. There is no reason to do so. Congress passed the 1972 amendments to expand the categories of persons

[19] In cases arising under the National Labor Relations Act courts have recognized that the traditional work of longshoremen includes stuffing and stripping of containers at the waterfront (although it does not include such work performed elsewhere). See *International Longshoremen's Association* v. *National Labor Relations Board*, 537 F. 2d 706 (C.A. 2), certiorari denied, January 10, 1977 (No. 76–570). See also *Humphrey* v. *International Longshoremen's Association*, C.A. 4, No. 75–2281, decided January 20, 1977, vacating 401 F. Supp. 1401 (E.D. Va.). Cf. Case Comment, *Work Recapture Agreements and Secondary Boycotts*, 90 Harv. L. Rev. 815 (1977) (discussing the extent to which longshoremen properly argue that stuffing and stripping of containers is their traditional work).

covered and to increase the benefits payable to waterfront workers. "The principal purpose" of the amendments was "to upgrade the benefits [and] extend coverage to protect additional workers." S. Rep. No. 92–1125, *supra,* at 1. To the same effect are *id.* at 12–13, and H.R. Rep. No. 92–1441, *supra,* at 1, 10.[20]

Congress desired to provide a uniform program of coverage at adequate rates to waterfront workers. Petitioners' construction of the Act, however, would relegate many waterfront workers to the inadequacies of the state compensation systems that Congress criticized. The statute therefore should be construed in a

[20] Because the 1972 amendments were designed to preserve the Act's existing coverage and to extend coverage to other workers as well, *Weyerhaeuser Co.* v. *Gilmore*, 528 F. 2d 957 (C.A. 9), certiorari denied, October 4, 1976 (No. 75–1620), upon which petitioners rely, was wrongly decided. The Ninth Circuit held in *Gilmore* that a worker injured while performing tasks upon the navigable waters is not covered by the Act, if those tasks do not relate to navigation. This decision would terminate the coverage of persons who were covered under this Court's interpretation of the original Act; the Court had held that all injuries on the navigable waters were covered, whether or not the worker was engaged in tasks related to navigation. See *Calbeck* v. *Travelers Insurance Co.*, *supra.* Nothing in the Act or its legislative history indicates that Congress intended to withdraw coverage from previously-covered workers or to adopt, in effect, a statutory version of the "maritime but local" test that had hectored the courts for decades and had led to the interminable litigation discussed in *Calbeck* and *Davis* v. *Department of Labor*, 317 U.S. 249, 253–257. See also pages 30–42, *infra.*

way that reaches all workers that Congress reasonably may have considered to be "longshoremen." [21]

B. ANY AMBIGUITY IN THE STATUTE SHOULD BE RESOLVED IN FAVOR OF COVERAGE

To the extent there is ambiguity in the 1972 amendments, it should be resolved in favor of coverage. Three principles support such a construction of the statute. The first, derived from the fact that the Act is a remedial statute to be liberally construed, has been discussed at page 16, *supra*. The other two are discussed below.

1. The Act should be construed to avoid the phenomenon of shifting coverage

The proper interpretation of the 1972 amendments to the Act depends, in part, upon the circumstances that brought about those amendments. The history of workers' compensation for waterfront workers is a history of shifting coverage, of constitutional uncertainties, and of repeated attempts by both Congress and this Court to produce a reasonably uniform system of compensation. Although that history does not entirely determine the meaning of the 1972 amendments, it provides substantial support for the Board's interpretation of them.

[21] This Court has referred to workers shoreward of the first or last "point of rest" of cargo as "longshoremen." For example, in *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, the Court recognized that "longshoremen" do more than the immediate loading and unloading of ships. 404 U.S. at 212–213. There is no reason to conclude that Congress used "longshoremen" in the 1972 amendments in a narrower sense.

In 1917 this Court held that state workers' compensation statutes could not constitutionally reach injuries sustained on the navigable waters in the course of maritime employment. *Southern Pacific Co.* v. *Jensen, supra.* In the wake of *Jensen* Congress twice authorized States to apply their compensation programs to such injuries, renouncing any interest in national uniformity; this Court twice held such authorizations unconstitutional as impairments of uniformity. *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149; *Washington* v. *W. C. Dawson & Co.,* 264 U.S. 219.

Although the Court continued to strike down state attempts to provide compensation for maritime injuries concerning which the Constitution required uniformity, the Court began to uphold state compensation for injuries on the navigable waters but touching on subjects of primarily local concern. The Court thus upheld an award of workers' compensation to a person injured while building a vessel (*Grant Smith-Porter Ship Co.* v. *Rhode,* 257 U.S. 469), although it disallowed an award to persons injured while painting or repairing completed vessels (*John Baizley Iron Works* v. *Span,* 281 U.S. 222; *Robins Dry Dock & Repair Co.* v. *Dahl,* 266 U.S. 449). The Court upheld an admiralty award based on a state statute for the wrongful death of a longshoreman injured in the hold of a vessel (*Western Fuel Co.* v. *Garcia,* 257 U.S. 233), but it disallowed a workers' compensation award for the wrongful death of a similarly situated longshoreman (*Washington* v. *W. C. Dawson & Co.,*

supra). It upheld an award to a longshoreman knocked from a pier to the water (*T. Smith & Son, Inc.* v. *Taylor,* 276 U.S. 179), but it disallowed an award to a longshoreman knocked from a vessel to the pier (*Minnie* v. *Port Huron Terminal Co.,* 295 U.S. 647).

The situation was chaotic at best.[22] Injured longshoremen did not know where to seek relief, and any attempt to obtain compensation might provoke years of litigation.

Congress provided a palliative by enacting the Longshoremen's Act in 1927. The solution was only partial, however, because Congress still desired to defer to state compensation systems, and Section 3(a) of the 1927 Act appeared to provide that the federal statute would not apply to injuries covered by state statutes. This seemed to incorporate the "maritime but local" distinction, under which the Court was allowing state remedies to apply to some injuries on navigable waters, within the terms of the statute; courts began to hold that the 1927 Act statutorily recreated the "maritime but local" test, so that every

[22] For other cases holding that the federal remedies were exclusive, see, *e.g., Great Lakes Dredge & Dock Co.* v. *Kierejewski,* 261 U.S. 479 (repair on boiler of scow moored in navigable waters); *Gonsalves* v. *Morse Dry Dock & Repair Co.,* 266 U.S. 171 (repair of shell plates on steamer in floating drydock). For cases holding that the States may supply a remedy, see, *e.g., State Industrial Commission* v. *Nordenholt Corp.,* 259 U.S. 263 (longshoreman injured on the pier); *Millers' Indemnity Underwriters* v. *Braud,* 270 U.S. 59 (diver injured while submerged sawing timbers that were blocking navigation); *Sultan Ry. & Timber Co.* v. *Department of Labor,* 277 U.S. 135 (workers injured while directing floating logs toward sawmill).

workers' compensation case presented a question of constitutional law. See, *e.g., Massman Construction Co.* v. *Bassett,* 30 F. Supp, 813 (E.D. Mo.), vacated for lack of jurisdiction, 120 F.2d 230 (C.A. 8), certiorari denied, 314 U.S. 648; *Alaska Packers Association* v. *Marshall,* 95 F.2d 279 (C.A. 9).

This left the relationship between federal and state statutes "shrouded in impenetrable confusion. * * * Indeed, decade by decade, things seemed to get worse—from the point of view of judges and lawyers, from the point of view of the unhappy state and federal officials who had to administer overlapping compensation systems and most of all from the point of view of maritime workers who suffered injury or death in the course of their employment." Gilmore and Black, *supra,* at 409. This Court eased some of the problems by creating a "twilight zone" in which both state and federal compensation systems could apply. *Parker* v. *Motor Boat Sales, Inc.,* 314 U.S. 244; *Davis* v. *Department of Labor,* 317 U.S. 249. This, too, was far from satisfactory, as the dispute about the boundaries of the "twilight zone" replaced the dispute about the reach of the "maritime but local" exception to the *Jensen* principle.[23]

This Court brought an end to much of the confusion and litigation in *Calbeck* v. *Travelers Insurance Co., supra. Calbeck* held that the Act applies to all injuries on the navigable waters, whether or not States consti-

[23] See, *e.g., Bethlehem Steel Co.* v. *Moores,* 335 U.S. 874; *Baskin* v. *Industrial Accident Commission,* 338 U.S. 854.

tutionally could apply their compensation statutes to such injuries under the "maritime but local" and "twilight zone" cases. The other side of the coin was decided in *Nacirema Operating Co.* v. *Johnson,* 396 U.S. 212, which sustained the administrative decision that the 1927 Act had no application to injuries occurring on the pier. *Nacirema* held that the 1927 Act created a test exclusively concerned with situs; although the Act applied to all injuries on the navigable waters, it applied to none on land (396 U.S. at 215–218). The Court explained (*id.* at 223–224):

> There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension [of Admiralty] Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.

The suggestion was reiterated in *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, which held that a longshoreman injured by a pier-based forklift may not recover under a warranty of seaworthiness. The Court emphasized the sturdiness of the *Jensen* line in the absence of statutory alteration; it observed, however, that "if denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Arts. I and III of the Constitution to enact a suitable solution" (404 U.S. at 216; footnote omitted).

Eleven months after the decision in *Victory Carriers*, Congress amended the Longshoremen's Act to provide compensation for injuries on land.[24] The 1972 amendments were intended to create a uniform and adequate system of workers' compensation for work-

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[24] Petitioners have not argued that this extension exceeds Congress' admiralty powers, nor would such an argument be tenable. The court of appeals rejected it (I.T.O. Pet. App. 40a–42a), as has every other court to consider a similar argument. See *Sea-Land Service, Inc.* v. *Director*, *supra*, 540 F. 2d at 635–638; *Jacksonville Shipyards, Inc.* v. *Perdue*, *supra*, 539 F. 2d at 544–546; *Dravo Corp.* v. *Maxin*, *supra*, 545 F. 2d at 377–379 and n. 4. This Court already has indicated in the passages from *Nacirema* and *Victory Carriers* quoted in the text that Congress may provide compensation for injuries occurring on the waterfront, and many cases have sustained earlier extensions of admiralty jurisdiction. See *The Genesee Chief*, 12 How. 443; *Richardson* v. *Harmon*, 222 U.S. 96; *Piedmont & Georges Creek Coal Co.* v. *Seaboard Fisheries Co.*, 254 U.S. 1; *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21; *Panama R.R.* v. *Johnson*, 264 U.S. 375, 386. The Court upheld the 1927 Act under the admiralty power of Congress (*Crowell* v. *Benson*, 285 U.S. 22, 41), and the 1972 amendments are constitutional as well. See also *United States* v. *Webb, Inc.*, 397 U.S. 179, 191; *The Lottawana*, 21 Wall. 558, 576.

ers in waterfront industries, throughout the course of their occupations. Congress desired to eliminate the arbitrary lines that separated those waterfront workers covered by the federal program from those covered by less adequate state programs. It would be ironic if the provisions enacted to accomplish that objective not only failed to do so but also recreated the difficulties of prediction and determination that the Court so lately (and after such labors) had ameliorated. The amendments should be interpreted in light of their goal of comprehensive coverage, and in light of the problems out of which they arose.

If anything is clear from the legislative history of the 1972 amendments, it is that Congress did not want to resurrect the phenomenon of shifting coverage that had been produced by *Jensen*, the "maritime but local" cases, and *Nacirema*. Both committees stated (S. Rep. No. 92–1125, *supra*, at 12–13; H.R. Rep. No. 92–1441, *supra*, at 10–11; Northeast Marine Br. App. ii–iv) that the "coverage of the present Act stops at the water's edge * * *. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs. To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate * * *. * * * The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over

water. * * * The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity."

Although adoption of petitioners' "point of rest" line would end the problem of shifting coverage for some workers, it would create a new problem for other waterfront workers whose daily work carries them from one side of the "point of rest" to another. It would, in other words, create a new *Jensen* line and perpetuate the kind of uncertainty Congress attempted to eliminate.[25]

Petitioners' argument that the first or last "point of rest" of cargo determines the scope of the Act's coverage finds no support in the language of the Act. Petitioners contend that the "point of rest" is well known in the trade and is easily located. But if this

[25] The worker assigned to do work shoreward of the first or last "point of rest" of the cargo still may be required, in the course of a day's work, to cross that line. Moreover, there would be substantial shifts in coverage for terminal laborers whose duties required them to discharge or load barges and lighters. Workers like Caputo, in the "terminal labor" category for the day, perform the amphibious work of loading and unloading such craft; this work is fully interchangeable with other terminal labor work not only on a daily basis but also on the same day. Caputo testified that he had done such tasks while working for Northeast in the "terminal labor" category, and that he could have been assigned to such amphibious tasks upon completion of the delivery of cargo that led to his injury (A. 8–9, 24–26). Similarly, the record establishes that workers in Blundo's classification work aboard vessels and at the water's edge, seaward of the point of rest, on many occasions (A. 67–69, 115–117, 123). Nothing in the concept of a "point of rest" line eliminates or even ameliorates the problem of shifting coverage.

is so, then it is odd that "point of rest" is not mentioned anywhere in the legislative history of the 1972 amendments, much less in the Act itself. If the line were so well understood, and were to be incorporated into the meaning of the statute, surely some committee or Member of Congress would have said so; none did.

The "point of rest" test would not produce uniform coverage; as workers crossed the "point of rest" from day to day, or even time to time during the day, they would shift in and out of the Act's coverage—the very evil Congress intended to eliminate.[26] Worse still, the "point of rest" can be a vague concept, changing (as the *amici* supporting petitioners discuss) from port to port. Different ports have different systems of handling cargo; sometimes different terminals within the same port use different systems.

[26] The First Circuit has remarked, in agreement with the court of appeals in the instant cases (I.T.O. Pet. App. 35a–39a), that the "point of rest" test "does not seem compatible with the 'uniformity' of coverage Congress was seeking." *Stockman* v. *John T. Clark & Son of Boston, Inc.*, *supra*, 539 F. 2d at 275.

See also *Jacksonville Shipyards, Inc.* v. *Perdue*, *supra*, 539 F. 2d at 543, which points out that, in addition to the reasons given in the text for rejecting the "point of rest" theory, the adoption of a point of rest line would create injustice. There, as here, "[p]etitioners apparently concede that [the workers] would be covered if [their] work were part of a continuous operation which began with the cargo's departure from a ship's hold. As respondents correctly point out, we are being asked to deny coverage purely because of a discontinuity in time created by the cargo's having been stored for a while along the shore." That line, the court of appeals concluded, was arbitrary and unjust because it would make a worker's coverage turn not upon what he was doing, but upon what other workers had done or not done in conveying the cargo to him for further handling.

The *amicus* brief of West Gulf Maritime Association points out (pages 3–9) that the process in every port requires a movement of cargo from point A (the ship) to point C (land transportation). Although there may be a point B (the first or last "point of rest") in between, it is an arbitrary construct. The functions performed in the terminal do not depend upon the location of the "point of rest," or even whether there is a "point of rest"—yet petitioners would give this point dispositive weight. Congress would not lightly have chosen this line, with its potential for ambiguous and shifting coverage, and it is hard to believe that it would have done so without some indication in the legislative history that this was intended.[27]

[27] Petitioners and the *amici* supporting them contend that the first or last "point of rest" is well known in each port, and that using it as a dividing line will not cause uncertain coverage. But the only useful definition of a "point of rest" is a break in the more or less continuous flow of movement of cargo across the pier. Each piece of cargo may move several times during this flow, including, as petitioners and the *amici* agree, several times before reaching the first "point of rest" after discharge from a vessel. If that is so, how long does the interruption in movement need to be to make a stopping place a "point of rest"? How, if at all, does the "point of rest" theory apply to bulk shipments of coal, oil or grain? Goods shipped in bulk may cross the pier in a continuous motion or may have several brief resting places. The definitions of the "point of rest" offered by the associations of stevedores are riddled with vague terms. See National Association of Stevedores Br. 13, 24–25. Similar ambiguities confronted the Court in *Victory Carriers*, leading it to remark that the "attempt to define the process of 'loading' * * * has produced substantial confusion in the lower courts; the cases are impossible to rationalize" (404 U.S.

The "duties-at-the-moment-of-injury" test, which petitioners also advocate, is equally inconsistent with the goal of eliminating shifting coverage.[28] Such a test would cause coverage of typical workers to shift from federal to state law, and back again, from moment to moment within a single working day. A longshoreman injured on a ship would be uncovered by the federal statute, under petitioners' arguments, if he took a few moments off to use the ship's head.

Although, as the Court held in *Parker* v. *Motor Boat Sales, Inc.*, *supra*, 314 U.S. at 247, the habitual performance of non-maritime duties does not make the Act inapplicable to a maritime injury, this does not mean (as petitioners apparently contend) that a worker's duties at the moment of injury are the only permissible consideration under the 1972 amendments. "The result of [petitioners'] interpretation would be to subject the scope of protection that Congress wished to provide, to uncertainties Congress wished to avoid" (*id.* at 250). A worker covered by the Act for any part of his duties therefore should be covered for all of them, when the injury takes place within a maritime situs specified by Section 3(a).

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at 214 n. 14). The Court therefore concluded that any rule of general applicability should strive to "decreas[e] the arbitrariness and uncertainties surrounding amorphous definitions of 'loading.' Such uncertainties may prejudice both the longshoreman and the employer" (*ibid.*). This principle calls for the rejection of petitioners' attempt to make the "point of rest" the determinant of coverage under the Act. No meaningful and certain rule can divide a single waterfront area into covered and uncovered operations.

[28] The Fifth Circuit adopted this test in *Jacksonville Shipyards, Inc.* v. *Perdue*, *supra*. For the reasons given in the text, we believe it erred in doing so.

Petitioners' "duties-at-the-moment-of-injury" test is inconsistent with a long line of cases emphasizing that the coverage of an employment relationship does not depend upon what the employee is doing when injured. In *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, an employee was killed while riding home from work in a car pool. The administrative official charged with applying the Act held that the injury arose out of and in the course of covered employment, and this Court agreed. It concluded that the interest in compensation does not depend upon the worker's activities at the moment of injury; it depends, rather, upon whether the injury arose out of job-connected risks. See also *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (drowning while trying to rescue swimmers at employer's recreation area is covered because a reasonable rescue attempt is part of the risks of employment); *O'Keeffe* v. *Smith, Hinchman & Grylls Associates*, 380 U.S. 359 (drowning while moving sand to form a beach is covered as part of the risks of the particular employment). These cases concern the requirement that the injury have taken place in the course of employment, but they are no less applicable to the employment status test of Section 2(3).

In any event, the "duties-at-the-moment-of-injury" test would be of no aid to petitioners. We have argued (see pages 20–39, *supra*) that all physical tasks involved in moving cargo between land and water transportation are covered by the 1972 amendments. Both Caputo and Blundo were injured while participating in the movement of cargo between ship and land

transportation, and they therefore were performing covered tasks when they were injured.[29]

[29] Petitioner I.T.O. (Br. 68–73) and the National Association of Stevedores (Br. 31–36) contend that the 1972 amendments, as interpreted by the Department of Labor, will require stevedore contractors to expend vast and unexpected sums of money. They argue that the size of this expenditure demonstrates that Congress could not have intended the interpretation of the statute adopted by the Benefits Review Board. But the committees did not project a cost for compliance with the 1972 amendments, and it therefore cannot be said that the cost of coverage is inconsistent with the expectations of Congress. Moreover, the argument about the costs of workers' compensation coverage overlooks the fact that the 1972 amendments substituted workers' compensation coverage for a system of derivative liability with which Congress was dissatisfied; an increase in the costs of workers' compensation payments therefore is offset, in part, by a decrease in other forms of liability.

Prior to the 1972 amendments, longshoremen injured on vessels could recover under the vessels' warranty of seaworthiness, without regard for the maximum recoveries provided in the Act. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85. The vessel then could seek indemnification from the master stevedore, if the unseaworthiness had been caused by the stevedore's operations. *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124. The warranty of seaworthiness was a form of strict liability (see *Crumady* v. *The J. H. Fisser*, 358 U.S. 423), so that recoveries, ultimately paid by the master stevedore, could be frequent and expensive. The 1972 amendments overturned the *Sieracki-Ryan* rule; they left the vessel liable to longshoremen only for negligence, and they provided that the vessel could not recover indemnity from the master stevedore (86 Stat. 1263, 33 U.S.C. (Supp. V) 905(b)). See generally *Gay* v. *Ocean Transport & Trading, Ltd.*, 546 F. 2d 1233 (C.A. 5). In return for surrendering the unseaworthiness remedy, longshoremen received expanded shoreside coverage at higher rates of compensation. See Gilmore and Black, *supra*, at 411; S. Rep. No. 92–1125, *supra*, at 5, 8–12.

It therefore should not be surprising that compliance with the 1972 amendments will increase the workers' compensation costs of employers. If petitioners consider the expense to be excessive, they should seek relief from Congress, not from this Court.

2. The Court should defer to the consistent administrative interpretation of the Act

The Act contains a presumption that disputed claims come within its coverage. Section 20(a), 33 U.S.C. 920(a). This Court has applied that presumption, and the associated principle that the views of the agency charged with the Act's administration are entitled to great deference,[30] in fashioning a rule that administrative decisions should be upset only on a showing of the clearest abuse. See *e.g.*, *Cardillo* v. *Liberty Mutual Insurance Co.*, *supra*, 330 U.S. at 474; *Davis* v. *Department of Labor*, *supra*, 317 U.S. at 256; *O'Keeffe* v. *Smith, Hinchman & Grylls Associates*, *supra*, 380 U.S. at 362. There has been no abuse here.

The Court also has held on numerous occasions that when a statute reasonably may be read in several ways, the agency charged with the administration of the statute may select a reasonable interpretation, and the courts will defer to its selection. See, *e.g.*, *Bayside Enterprises, Inc.* v. *National Labor Relations Board*, No. 75–1267, decided January 11, 1977, slip op. 5–7; *Steelworkers* v. *Usery*, No. 75–657, decided January 12, 1977, slip op. 8; *National Labor Relations Board* v. *Enterprise Association*, No. 75–777, decided February 22, 1977, slip op. 19–20.[31] In

[30] See *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–434; *Udall* v. *Tallman*, 380 U.S. 1, 16; *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408.

[31] See also *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405, 421; *Johnson* v. *Robison*, 415 U.S. 361, 367–368.

these cases the Board has interpreted the Act in a reasonable fashion, and its decision—concurred in here by the Director, who has the responsibility for the administration of the Act—is entitled to deference.[32] There is a "reasonable legal basis" (*Cardillo* v. *Liberty Mutual Insurance Co., supra,* 330 U.S. at 379) for the award of benefits to Caputo and Blundo, and the awards therefore should be upheld.

II

EVERY PLACE WITHIN ANY WATERFRONT FACILITY SATISFIES THE MARITIME SITUS REQUIREMENT OF THE ACT

The court of appeals concluded (I.T.O. Pet. App. 30a–31a and n. 19) that Blundo and Caputo were injured within a maritime situs, as required by Section 3(a) of the Act. Petitioner in No. 76–454—but not petitioners in No. 76–444[33]—argues that this decision is incorrect.

[32] Under Department of Labor Regulations, the Board has the responsibility for applying the Act to individual cases in formal proceedings, and the Director has general superintendence over the administration of the Act and its application in the overwhelming majority of cases decided informally. See 33 U.S.C. (and Supp. V) 939; 20 C.F.R. Parts 701 and 702. Although the 1972 amendments abolished the system under which awards of deputy commissioners were reviewed initially by district courts, there is no indication in the amendments or their legislative history that the Board and the Director are entitled to less deference than the deputy commissioners. Indeed, since the 1972 amendments created a central and uniform system of administration to replace the several independent deputy commissioners, the Director and the Board should be entitled to greater deference.

[33] Petitioners in No. 76–444 explicitly concede that Caputo was injured at a situs covered by the Act. Br. 3 n. 1.

Section 3(a) provides that compensation is payable if the injury occurs "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." Petitioner I.T.O. argues that the pier or terminal where Blundo was injured should be carved up, and the 19th Street end (where Blundo was injured) should be excluded from coverage, while the 21st Street end (where vessels routinely are loaded and unloaded) would be a maritime situs (Br. 64–68). This division would produce mass uncertainty, and it is not supported by either the language or the legislative history of the statute. The court of appeals held that Blundo was injured on an "adjoining pier," and that petitioner's argument to the contrary "flies in the face of the statute" (I.T.O. Pet. App. 31a n. 19).

The position of the Benefits Review Board, and of the Director, is that every place within any waterfront facility devoted primarily to maritime activities has a maritime situs for the purpose of Section 3(a). That interpretation has been upheld explicitly by one court of appeals.[34] Other courts, including the court

[34] See *Sea-Land Service, Inc.* v. *Director, supra,* 540 F. 2d at 638. Indeed, the position of the Third Circuit in *Sea-Land Service* goes beyond the position taken by the Board. In the view of that court, "[a]s long as the employment nexus (status) with maritime activity is maintained, the federal compensation remedy should be available. * * * It is the situs of the vessels in maritime commerce, not the situs of their maritime employees at the time of the injury, that in our view Congress referred to by its reference to navigable waters." See also *Dravo Corp.* v. *Maxin, supra,* 545 F. 2d at 381.

of appeals in the instant cases, have concluded that, at a minimum, every "pier" or "terminal" adjoining the water has a maritime situs, whether or not the place where the injury occurs is used to load or unload vessels.[35] Here, as with the definition of "employee" under Section 2(3), the administrative interpretation of the statute is reasonable and should be sustained.

Section 3(a) provides that the Act applies to an injury on "*any* adjoining pier * * * [or] terminal" (emphasis added). Professors Gilmore and Black concluded (*The Law of Admiralty, supra,* at 424) that " '[a]djoin' presumably means something like 'border on' or 'have direct access to' navigable waters * * *. * * * It may be assumed that the intent of the Congressional draftsman was to cover all employment-related injuries suffered by workers engaged in the specified activities. If that assumption is correct,

[35] See *Stockman* v. *John T. Clark & Son of Boston, Inc., supra,* 539 F. 2d at 271–272; *I.T.O. Corp. of Baltimore* v. *Benefits Review Board, supra,* 529 F. 2d at 1083–1084.

The Fifth Circuit has taken a different view. *Jacksonville Shipyards, Inc.* v. *Perdue, supra,* 539 F. 2d at 541–542, holds that a pier or terminal adjoining the waters has a maritime situs only if it is being used, at the time of the injury, to load, unload, repair or build a vessel. In our view, the Fifth Circuit's interpretation of the situs requirement is unjustifiably narrow, and we have filed a petition for a writ of certiorari to review it (No. 76–1166). But however that may be, *Jacksonville Shipyards* does not support petitioners here. The terminals where Blundo and Caputo were injured were used as part of the overall process of unloading vessels, and the workers were injured while taking part in that process. The Fifth Circuit upheld compensation awards to persons situated identically to Blundo and Caputo. See 539 F. 2d at 543 (Ford), 544 (Bryant).

'adjoin' should be broadly, not narrowly, construed; the essential test should be whether the injury occurred in the course of maritime employment and not on how close the situs of the injury was to the water's edge." Such a reading of Section 3(a) is necessary to eliminate "the phenomenon of shifting coverage" (*Sea-Land Service, Inc.* v. *Director,* 540 F. 2d 629, 638 (C.A. 3)), which we have discussed at pages 30–42, *supra.*

The rule for which petitioner contends would produce confusion and uncertainty by dividing a single maritime facility into many parts, some of which have a maritime situs and others of which do not; what is more, the maritime nature of a particular place might change from day to day or even time to time within a day, depending on the tasks being performed there when an injury occurred.[36] This would produce an irrational system of compensation, requiring the Board and courts to engage in complex and extensive line-drawing.

Blundo was indisputably upon a "pier" or "terminal" when he was injured; that fact alone is sufficient to establish a maritime situs. It is not necessary that the "pier" or "terminal" be used to load or unload vessels; the "loading" and "unloading" language in Section 3(a) modifies only the "other adjoining area[s]" not specifically listed by Congress as having

[36] Although petitioners have not argued that a place could gain or lose its maritime situs depending upon its use at a particular time, the Fifth Circuit so concluded in *Jacksonville Shipyards, Inc.* v. *Perdue, supra,* 539 F. 2d at 541.

a maritime situs. Section 3(a) is most sensibly read as providing that all piers or terminals adjoining the water have a maritime situs, and that any "other adjoining area" has the required situs if it is "customarily used by an employer in loading, unloading, repairing, or building a vessel."[37]

Petitioner argues that the "customarily used" language modifies "pier" and "terminal" as well as "other adjoining area," but that reading—which would ordinarily require the use of a comma between "area" and "customarily"—would make much of Section 3(a) surplusage. If petitioner were correct, the statute would read as if it provided coverage for injuries occurring on the "navigable waters (including any area customarily used by an employer in loading, unloading, repairing, or building a vessel)." Congress did not enact such a statute, however; the enumeration of places in the first part of the parenthetical expression in Section 3(a) should be given effect if at all possible, and that can be done only by reading the "customarily used" language as modifying "other adjoining area" but not the enumerated places. The court of appeals therefore correctly held (I.T.O. Pet. App. 31a n. 19) that "any pier next to the water is included within the situs definition."

But however that may be, Blundo is covered by the Act because he was injured within a "pier" or "terminal" used for the loading and unloading of vessels.

[37] See, *e.g.*, *Dravo Corp.* v. *Maxim*, *supra* (a fabrication shop some distance from a navigable river is a maritime situs because the shop customarily is used to fashion parts of ships and is part of a shipyard adjoining the water).

The terminal where he was injured was used for loading and unloading on one end and for cargo handling on the other (see pages 7–8, *supra,* and I.T.O. Pet. App. 31a n. 19). The statute, under either of the above readings, does not contemplate subdivision of a maritime facility that is both a terminal and used for the loading and unloading of vessels.

Indeed, Blundo spent approximately 20 percent of his time at that very terminal checking cargo being loaded onto and discharged from ships, and an additional amount of time checking cargo being transferred to and from lighters and barges (A. 67–69, 115–117). Moreover, Blundo was involved in cargo handling—and therefore part of the process of transfer from water to land transportation—at the very moment of his injury. He was injured at a situs specified in Section 3(a).

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-444

NORTHEAST MARINE TERMINAL COMPANY, INC. and STATE INSURANCE FUND,
Petitioners,

—v.—

RALPH CAPUTO,

—and—

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

No. 76-454

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Petitioner,

—v.—

CARMELO BLUNDO,

—and—

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONSOLIDATED BRIEF FOR RESPONDENTS RALPH CAPUTO AND CARMELO BLUNDO

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IN THE

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OCTOBER TERM, 1976

No. 76-444

NORTHEAST MARINE TERMINAL COMPANY, INC.
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Petitioners,

—v.—

RALPH CAPUTO,

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

No. 76-454

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Petitioner,

—v.—

CARMELO BLUNDO,

—and—

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

CONSOLIDATED BRIEF FOR RESPONDENTS RALPH CAPUTO AND CARMELO BLUNDO

Counterstatement of Question Presented

Are the Findings and Decisions of the Administrative Law Judges, the Benefits Review Board and the Second Circuit Court of Appeals correct in holding that the individual Respondents, Carmelo Blundo and Ralph Caputo, are covered employees under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act?

Counterstatement of the Case

Ralph Caputo and Carmelo Blundo (hereinafter referred to as Caputo and Blundo) were employees of the Northeast Marine Terminal Co., Inc. and the International Terminal Operating Co., Inc., respectively, at the time when they were injured while in the course of their employment. These cases are, therefore, workers' compensation claims and were processed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as LHCA or the Act) as amended by Congress, 33 U.S.C. 901 et seq. In each claim the employee was found by an Administrative Law Judge (hereinafter referred to as ALJ) to have sustained a compensable injury under the LHCA (Caputo Pet. 51a, Blundo Pet. 49a, 60a).[1]

The Compensation Orders of the respective ALJs were appealed to the Benefits Review Board (hereinafter referred to as the BRB or the Board). The Board affirmed the decisions in all respects (Caputo Pet. 47a, Blundo Pet. 45a). Petitions for review were filed with the Court of Appeals for the Second Circuit, which by a divided Court,

[1] The designation "Caputo Pet." refers to the appendix to the Petition for a Writ of Certiorari in No. 76-444 and "Blundo Pet." refers to the appendix to the Petition in No. 76-454. The designation "A" refers to the Consolidated Appendix filed herein.

affirmed the determinations of the BRB (Caputo Pet. 1a, 56a, Blundo Pet. 1a). A petition for rehearing made by the Petitioner in the Caputo case was denied by the Court of Appeals (Caputo Pet. 59a) and thereafter a Petition for a Writ of Certiorari was filed on September 27, 1976 in the Caputo case (76-444) and on September 28, 1976 in the Blundo case (76-454). Both Petitions were granted on December 6, 1976 and the cases were consolidated for argument.

The factual circumstances surrounding the injuries sustained by each employee are as follows:

1. *Ralph Caputo*: The facts stipulated by both sides (A 4-7) are that Mr. Caputo was injured on April 16, 1973 while in the employ of Northeast Marine Terminal Co., Inc. (hereinafter referred to as Northeast). At the time of the injury, Mr. Caputo was working within the terminal area (adjacent to navigable waters of the United States) maintained by Northeast, handling cargo that had been offloaded from a Yugoslavian ship approximately five days prior to the accident. When Mr. Caputo was injured, he was loading a consignee's truck with boxes of cheese (A 39) which had been put on a dolly inside of the truck by a fellow longshoreman operating a forklift machine. While pulling the dolly loaded with cheese back into the truck he hit a backstop and fell and injured his left foot and back (A 28). Northeast concedes that Caputo met the situs requirements of the Act in its brief at page 3, footnote #1.

The factual record developed by Caputo's testimony, uncontradicted by Northeast, indicated that he was regularly employed as a longshoreman to work aboard vessels as a holdman (A 9) as part of a regular gang for Pittston Stevedoring (A 10). When there is no work available to him he then shapes-up at a hiring hall maintained by the New York

Waterfront Commission and is hired out by other stevedoring companies or terminal operators, wherever work is available (A 14). The duties of a terminal labor employee, also known as extra-labor, are to load and unload trucks which arrive at the employer's terminal and which bring cargo for overseas shipment or pick up cargo that was unloaded from a vessel within the terminal area, to load and unload barges and lighters that are afloat, and to load and unload ships' stores (A 8). Mr. Caputo had been engaged in this type of activity for the past twenty years on and off for Northeast (A 22) and that while so engaged he worked approximately 20% of his time aboard barges, lighters and ships (A 25-26) and 80% within the terminal area in the preparation for waterborne cargo to be shipped overseas and effecting delivery of imported cargo to consignees' truckmen. All of the work is done within the marine terminal area maintained by Northeast at 39th Street, Brooklyn, New York and all of the ships are loaded or unloaded alongside the terminal.

Mr. Caputo considers himself to be a longshoreman (A 7). He also considers that the terminal labor work he performs is "dock work" (A 8-9). At the time of the accident, he was asked by his "checker" (A 27) to load the Tomaselli truck, an outside independent carrier.

Mr. Caputo was paid compensation for his lost time, as well as for 15% permanent partial disability of the left foot as directed in the Order of the ALJ (Caputo Pet. 54a-55a). This payment must be made by the employer and/or its insurance carrier, notwithstanding an appeal taken in the case as provided by the amended Act, 33 U.S.C. 921(b)(3).

2. *Carmelo Blundo*: The stipulated record in the Blundo case indicates that the parties agreed that the employee, Mr. Blundo, was injured on January 8, 1974 while in the employ of the Petitioner, International Terminal Operating Co., Inc. (hereinafter referred to as I.T.O.). The injury occurred at I.T.O.'s pier facility at 21st Street, Brooklyn, New York (Blundo Pet. 51a) and that the area runs approximately 1,000 feet from 21st Street to 19th Street, and extends approximately 700 feet from the gate entrance to the water's edge (A 62-63).

The testimony of Mr. Blundo shows: that he was employed as a checker by I.T.O. for approximately five years (A 60-61, 63); that approximately 20% of his time was spent actually on board vessels (A 67); and that on the day he was injured, Mr. Blundo was working on the 19th Street side of the pier, approximately 30 to 40 feet from the water's edge (A 69). He was checking cargo being unloaded (stripped) from a container alongside a bonded warehouse under the supervision of the U.S. Customs Agents (A 69). The purpose of this procedure was to make sure U.S. Customs duties due were paid before a consignee picked up imported cargo (A 73) located at this facility (A 29, 71, 80). While the container was being stripped, Blundo slipped on ice on the ground and fell (A 74), sustaining injuries.

It is the business of I.T.O. to load and unload cargo from ships and in that capacity it engages longshoremen to work both on the vessels and on the dock (A 64). Mr. Blundo does not know in advance each day where he will be assigned to work and even during the day, his work assignment may vary. In any event, his work activities would involve the checking of cargo that was either discharged

from a vessel or about to be loaded on a vessel, or he would actually work on board the vessel itself.

The container involved at the time of the accident had been unloaded at a pier facility, not located in Brooklyn (A 70), from a vessel owned by the American Export Lines, and was transported overland by an independent trucking company to the 21st Street pier where it had to be put into a bonded warehouse (A 71, 76-77). At the time that the checker is tallying the cargo, he has a manifest sheet in his possession which indicates the name of the consignee, the cargo, the amount of cargo and the name of the ship on which it had been transported (A 86, 87). The container had not been opened by anyone prior to the time it was received by I.T.O. at the 21st Street pier facility. The seal had to be broken and shown to a Customs Agent (A 87). Mr. Blundo was the first person to break the seal that had been placed on the container in a foreign port. The reason that the container must be stripped is to segregate cargo contained therein to effect delivery to multiple consignees (A 89). The consignee's truckman would pick up said cargo at the 21st Street Terminal.

The method of discharging a container vessel was confirmed by I.T.O.'s witness, Mr. Cash (A 106). The container is removed from the vessel and then landed on a string piece. The container is then moved to a warehouse where it is stripped so that delivery of the cargo that is stowed within it could be effected to multiple consignees. If the entire cargo in a container is destined for one consignee, then this container is not stripped, but nevertheless delivery is effected when the consignee's truckman picks it up within the terminal area maintained by the stevedoring

company and/or terminal operator. Each and every time a consignee's truckman picks up cargo for further transshipment from the terminal area, there must be a checker present in order to tally the cargo delivered and to have a receipt signed for same by the truckman (A 112). This checker works with a hilo driver and a so-called legman, who does the actual physical work of lifting the individual cases of cargo. The legman, the hilo driver, as well as the checker, are all known as longshoremen. They are also referred to as longshoremen by the employer, as well as by the employees themselves.

I.T.O. is not in the warehousing business, per se. There is no charge made for warehousing any cargo (A 118) that is handled by I.T.O. when it is discharged from a vessel or when it is received for the purpose of being put on board a vessel. There must be an enclosed area wherein this cargo has to be unloaded or stripped from a container in order to protect it from the elements and this area is called a warehouse. In the event that a consignee delays in picking up cargo that has been received by I.T.O. beyond the so-called free-time period, then there is a demurrage charge levied against the consignee by reason of the fact that he is utilizing pier facilities for storage beyond the free-time allotted (A 118).[2]

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[2] I.T.O. is as much in the warehousing business as is a Post Office. Both receive goods (one cargo, the other mail) intended for further shipment. While the goods are in the custody of each, they must be protected from the elements. Pending further shipment, the goods are temporarily stored or held in a Post Office or in the so-called warehouse or storage shed in the terminal area.

Summary of Argument

These cases involve an interpretation of the 1972 Amendments to the LHCA. The Act is a workers' compensation law, i.e. remedial legislation, which should be liberally construed in favor of claimants to effectuate its humanitarian purposes. Doubts, both legal and factual, should be resolved in favor of claimants. Further, the Act should not be narrowly or technically construed.

Petitioners herein seek review of determinations of an administrative agency, the BRB. The scope of review of agency determinations by a Court is strictly limited by what is generally known as the substantial evidence test. The determination should be affirmed unless the determination is unsupported by substantial evidence, is irrational or is forbidden by law. The BRB has adopted a consistent, rational interpretation of the 1972 Amendments and this interpretation should be accorded great weight.

To further effectuate its purposes, the Act contains certain presumptions in favor of a claimant. These presumptions can be rebutted by an employer only by the presentation of substantial evidence that coverage under the Act does not extend to the particular injured employee. Petitioners failed to present such evidence and, at most, in Respondents' opinion, have presented a legal theory which has no support in either the language of the Amendments or the legislative history.

Respondents believe the 1972 Amendments adopted a two pronged test to determine coverage under the Act. The first involves a determination of an employee's "status"

and the second involves the "situs" where the accident occurred.

The Amendments extended coverage to all employees engaged in maritime employment, specifically including longshoremen and other persons engaged in longshoring operations. While these terms are not defined in the Act, looking to other sources it is submitted that longshoremen do more than simply load and unload a vessel between the ship and a "point of rest" as contended by Petitioners. They move, handle and process cargo through a waterfront facility from the time a truck stops at the terminal with goods to be loaded aboard a vessel until a truck leaves the terminal loaded with cargo that was discharged from a vessel. Similarly, longshoring operations are those performed by longshoremen moving, handling and processing the cargo between the terminal area and the vessel, as well as those additional operations necessary to the moving of the cargo, such as those of a checker tallying cargo. Further, with the advent of containerization, a modern cargo handling technique, the stripping and stuffing of a container has become the functional analogue to loading and unloading a vessel. Under this interpretation of the Act, both Respondents, Caputo and Blundo, are engaged in longshoring operations and are thus engaged in maritime employment.

Petitioners attempt to limit maritime employment by a "point of rest" theory. Such a theory finds no support in the language of the Act, nor in the legislative history. This theory has been expressly rejected by at least four Courts of Appeals. Such a theory improperly reads language into the Amendments not used by the Congressional Committees in their reports and not used by Congress in the Amend-

ments. Further, the theory creates an arbitrary division of longshoring activities occurring in a waterfront terminal and thus destroys the very uniformity of coverage Congress intended to create. This Court should not legislate a standard which Congress did not adopt.

The second test of coverage under the Amendments is an expanded situs test. No longer are navigable waters limited to those areas seaward of the shoreline. Now navigable waters specifically include (for the purposes of this Act) any adjoining pier, wharf, dry dock, terminal, building way and marine railway. Also included are "any other adjoining areas customarily used by an employer to load and unload vessels." The latter phrase does not limit the first as contended by Petitioners. Rather Congress meant to include all the specifically enumerated areas, as well as any additional area customarily used to load and unload vessels. Even if the "customarily used to load and unload" language does limit the enumerated areas to those so used, the areas involved in these cases were so used. Stripping and stuffing containers are functionally equivalent to loading and unloading a vessel and Respondent Blundo was involved in the stripping of a container. Thus Respondent Blundo met the situs test.

ARGUMENT

I.

In dealing with compensation law there are a number of basic legal doctrines and statutory requirements which must be followed.

The LHCA is remedial legislation which should be liberally construed in favor of the claimant, e.g. *Voris* v. *Eikel,* 346 U.S. 328 (1953); *Reed* v. *The Steamship Yaka,* 373 U.S. 410, rehearing denied 375 U.S. 872 (1963). In order to effectuate the humanitarian purposes for which the Act was enacted, doubts, both legal and factual, are to be resolved in favor of injured employees, *Friend* v. *Britton,* 220 F.2d 820 (D.C. Cir.), cert. denied sub nom. *Harry Alexander, Inc.* v. *Friend,* 350 U.S. 836 (1955); *Potomac Electric Power Co.* v. *Wynn,* 343 F.2d 295, 299 (D.C. Cir. 1965); *Young & Co.* v. *Shea,* 397 F.2d 185, 188, rehearing denied 404 F.2d 1059, 1061-62 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969); *Continental Insurance Co.* v. *Byrne,* 471 F.2d 257, 260-61 (7th Cir.), cert. denied, 406 U.S. 918 (1972).

Further, the scope of review of administrative determinations is generally limited on appeal. The BRB is specifically limited by the amended Act under 33 U.S.C. 921(b)(3):

> "The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party-in-interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the

> decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole . . ."

It is thus evident that the BRB's power under the Act is strictly to review the factual record and the conclusions reached by the ALJ. If the decision of the ALJ is supported by substantial evidence, the BRB must affirm it. Upon further review by a Court, administrative findings may not be disturbed unless they are unsupported by substantial evidence on the record considered as a whole, *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, 508 (1951); *Banks* v. *Chicago Grain Trimmers Assn.,* 390 U.S. 459, 467 (1968); *Young & Co.* v. *Shea, supra.* An agency's decision cannot be disturbed unless it is irrational or forbidden by law, *O'Keefe* v. *Smith Associates,* 380 U.S. 359, 363 (1965); *Cardillo* v. *Liberty Mutual Insurance Co.,* 330 U.S. 469, 478 (1947). A reviewing court may not set the determinations aside because it would weigh or appraise the evidence differently, so long as the record considered as a whole contains substantial evidence to support said determinations, *Norton* v. *Warner Co.,* 321 U.S. 565, 568 (1944).

Although the above cases dealt with the pre-1972 Act, the same standards apply to review under the amended Act. The new Act substituted the ALJ for the Deputy Commissioner who acted as the administrative quasi-judicial officer and rendered initial decisions on disputed cases. The Board replaced the U.S. District Courts in order to create an internal administrative appeal. Notwithstanding the fact that the Act does not refer to the scope of judicial review, the legislative history of the Amendments clearly

shows the same standard of review under the amended law was intended, see *Offshore Food Service, Inc.* v. *Benefits Review Board,* 524 F.2d 967 (5th Cir. 1975); *Potenza* v. *United Terminals, Inc.,* 524 F.2d 1136 (2nd Cir. 1975); and *Nardella* v. *Campbell Machine, Inc.,* 525 F.2d 46 (9th Cir. 1975).

A reviewing court should give deference to a consistent and reasonable interpretation of a statute by the agency charged with its administration, *Johnson* v. *Robison,* 415 U.S. 361, 367-8 (1974). As will be shown below, the determinations of the BRB that Respondents are covered employees is not erroneous and should be upheld, *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965).

With particular reference to the "coverage" provision under the Act, there is an express statutory presumption that the claim comes within this provision, 33 U.S.C. 920 (a); see *Cardillo* v. *Liberty Mutual Insurance Co., supra,* at 474; *Overseas African Construction Corp.* v. *McMullen,* 500 F.2d 1291, 1296 (2d Cir. 1974). This statutory requirement should be read expansively so as to permit the broadest coverage that the Act permits, *Calbeck* v. *Travelers Ins. Co.,* 370 U.S. 114, 130 (1962); *Michigan Mutual Liability Co.* v. *Arrien,* 344 F.2d 640, 645-6 (2nd Cir.), cert. denied, 382 U.S. 835 (1965).

Further, the effect of Section 920 is to place the burden of proof on the employer, *Wheatley* v. *Adler,* 407 F.2d 307 (D.C. Cir. 1968); *Travelers Insurance Company* v. *Donovan,* 221 F.2d 886 (D.C. Cir. 1955). It is the legal obligation of the employer to present evidence to meet the presumption that the claim comes within the provisions of the Act. However, merely presenting evidence to meet the presump-

tion is insufficient. An employer and/or its insurance carrier can overcome this statutory presumption only when it introduces substantial evidence to the contrary, *Del Vecchio* v. *Bowers,* 296 U.S. 280 (1935); *Liberty Mutual Insurance Co.* v. *Gray,* 137 F.2d 926 (9th Cir. 1943); *Butler* v. *District Parking Management Co.,* 363 F.2d 682 (D.C. Cir. 1966).

Only when substantial evidence is presented is the presumption overcome and no longer controlling on the result, *John W. McGrath Corp.* v. *Hughes,* 264 F.2d 314 (2nd Cir.), cert. denied, 360 U.S. 931 (1959). An employer must produce facts, not speculation, to overcome the presumption of compensability, and reliance on mere hypothetical possibilities in rejecting a claim is contrary to the presumption created in Section 920(a), *Steele* v. *Adler,* 269 F. Supp. 376 (D.D.C. 1967).

Judge Friendly, in his opinion below, remarked on the unsatisfactory state of the record, *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35, 47 (2nd Cir. 1976). Respondents contend that each question raised by Judge Friendly was one which could have and should have been answered by Petitioners. They should have presented evidence at the trial before the ALJ that the claims do not fall within the provisions of the Act. All that they have done is to argue for a legal theory that we will show has no basis in the Act nor in the legislative history. Petitioners have simply failed to meet their burden of proof to introduce evidence, substantial or otherwise, to overcome the presumption. This Court is urged not to make any decision contrary to long accepted legal doctrine on the presumption in favor of injured employees.

Furthermore, claimants, because of the presumptions, need not meet the preponderance of the evidence standard

required in civil trials, *Strachan Shipping Co.* v. *Shea,* 406 F.2d 521 (5th Cir.), cert. denied, 395 U.S. 921 (1969). They need only meet a less stringent burden of proof in order to shift the burden to the employer, who is best able to meet the financial expense in connection therewith. Claimants in the cases on review more than met their respective burdens of proof.

II.

The decision of the Second Circuit Court of Appeals holding that Ralph Caputo and Carmelo Blundo come within the amended provisions of the Act is correct.

All of the parties participating in these cases are in agreement that the amended Act intended to provide expanded coverage to longshoremen who are engaged in maritime activity working within a terminal area or on the dock.

Prior to the 1972 Amendments, it had been consistently held by the Courts that LHCA benefits were applicable only to those employees who are engaged on board a vessel over navigable waters of the United States in the performance of their duties in the loading and discharging of vessels, *Nacirema Operating Co., Inc.* v. *Johnson,* 396 U.S. 212 (1969); and *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202 (1971). This created an inequity among workers for the same employer, some of whom may have been injured while working on board a vessel and others who may have been injured on the dock in the performance of their tasks as longshoremen. An employee injured on the vessel would be paid under the LHCA, whereas an employee who was injured on the dock would be paid under the compensation laws of the State wherein the pier was located. In many instances, this created a gross disparity of benefits to the

group of employees who worked on the dock, essentially doing the same type of work for the same employer, as opposed to the employees who worked on the ship.

Prior to 1972, the shoreside longshoremen in many cases brought third-party actions based on unseaworthiness against shipowners, who in turn impleaded the employer, *Seas Shipping Co., Inc.* v. *Sieracki,* 328 U.S. 85 (1946); *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.,* 350 U.S. 124 (1956). It was the employer's lament that in the end they were paying for compensation and third-party liability.

In order to eliminate the plethora of litigation and to provide increased benefits for all longshoremen generally, and in order to make applicable to all longshoremen a uniform compensation Act, the Amendments, effective November 26, 1972, were enacted by Congress. The provisions of these Amendments provided for two very important and substantial benefits to injured employees, as well as to stevedoring companies and the terminal operators. The new Act eliminated the injured employee's third-party right to sue the shipowner on the theory of unseaworthiness. The new Act also specifically eliminated the right of the shipowner to implead the stevedore or terminal operator. This provision was a great benefit to the stevedoring company or terminal operator because of the fact that in third-party cases the stevedoring company or terminal operator could not now be impleaded by the shipowner. In exchange, the injured employee was given a substantial increase in compensation benefits from a monetary point of view, and in addition, the new Act sought to rectify the injustice of having multiple compensation laws applicable to injured employees who are essentially doing the same type of work. The new Act specifically recognized that more longshoring

work and operations are conducted within the terminal area than are done on board ship by reason of the container method of shipment that had been introduced and is now widely used throughout all of the ports of this country, Sen. Rep. No. 92-1125, 92nd Cong. 2d Sess. p. 13; H.R. Rep. No. 92-1441, 92nd Cong. 2d Sess. p. 10.

Suffice it to say that there was a quid pro quo in that the longshoremen gave up an important third-party right on the basis of unseaworthiness in exchange for increased benefits and expanded coverage and the employers obtained a benefit under the amended Act in that shipowners could no longer implead them in third-party actions, see decision below, *Pittston Stevedoring, supra,* 544 F.2d at 47.

A. *Both Caputo and Blundo Were Engaged in Maritime Employment.*

The relevant language of the amended Act, 33 U.S.C. 902(3), is as follows:

> "Employee means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . . "

It appears immediately upon a reading of this section that it is not necessary for this Court to provide a comprehensive definition of maritime employment. If Respondents, Caputo and Blundo, are found to be either longshoremen or other persons engaged in longshoring operations, they must be deemed covered employees since these persons are specifically included within the meaning of maritime employment. The use of the word "include" in a definitional section of a statute usually is a term of enlargement and not limitation, see *Federal Land Bank* v. *Bismark Lumber Co.,* 314 U.S. 95, 99-100 (1941). Indeed, as noted in a leading treatise:

"It is evident that the intent of Congress in defining the term employee as it has in this Act is to include within the coverage of the Act all maritime employees, other than those specifically excluded. In order to leave no room for any doubt, longshoremen and persons performing longshoring operations are specifically included, and so are harbor workers, ship repairmen, shipbuilders and shipbreakers so that in the case of such persons it is quite unnecessary to engage in any abstract discussion of the meaning of the term 'maritime employment' . . . " 1A Benedict on Admiralty Sec. 16 (7th ed. (rev.) 1973)

Reference to the legislative history should not be necessary if the statute is clear and unambiguous, *United States* v. *Oregon,* 366 U.S. 643, 648 (1961); see also the dissent of Judge Craven, *I.T.O. Corp.* v. *Benefits Review Board,* 529 F.2d 1080, 1094 (4th Cir. 1976). We agree with Judge Friendly below that the phrase "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . . " 33 U.S.C. 902(3), "is to be construed no differently than if it said any longshoreman or other person engaged in longshoring activities or engaged in other maritime employment." *Pittston Stevedoring, supra,* 544 F.2d at 52. Thus the issue is simply whether Respondents were either longshoremen or engaged in longshoring operations while in the employ of Petitioners. To exclude a longshoreman from coverage would negate the express language of the Amendment.

The Act is unfortunately silent on a definition of what a longshoreman is or what longshoring operations are. Petitioners argue that a "point of rest" theory limits the definition of these terms. Petitioner in the Blundo case, as well as the Amicus Curiae for Petitioners, attempt to make their

position more credible by the constant repetition that longshoring activities are strictly limited to loading or unloading a vessel under their "point of rest" theory.

Contrary to Petitioners' assertions, a longshoreman is generally deemed to be a laborer employed about a waterfront facility moving, handling and processing cargo. In *Intercontinental Container Transport Corp.* v. *New York Shipping Association,* 426 F.2d 884 (2nd Cir. 1970), the Court said:

"Historically, the work of longshoremen included the preparation of cargo for shipment by making up, for example, drafts and pallets and, in connection with unloading cargo, the breaking up of drafts and pallets, sorting the cargo according to its consignees and delivering it to trucks or other carriers." (at 886)

And, in *Humphrey* v. *International Longshoremen's Association,* 401 F. Supp. 1401 (E.D. Va. 1975), the Court found:

"For several decades, employees represented by the ILA have performed essentially all of the labor required in loading and unloading cargo at piers and waterfront terminals in the port of Hampton Roads. This work included cargo repair and maintenance, the preparation of cargo for loading, the sorting of cargo according to consignees and types, and the delivery of cargo to trucks or other inland carriers, as well as the physical loading or unloading of cargo ships." (at 1406)

Definitions of "longshoreman" appear in the Bi-State Compact creating the Bi-State Waterfront Commission, approved by Congress, 67 Stat. 541, August 12, 1953. The first definition appears as follows:

"'Longshoreman' shall mean a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal, either by a carrier of freight by water or by a stevedore

(a) physically to move waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, or

(b) to engage in direct and immediate checking of any such freight or of the custodial accounting therefor or in the recording or tabulation of the hours worked at piers or other waterfront terminals by natural persons employed by carriers of freight by water or stevedores, or

(c) to supervise directly and immediately others who are employed as in subdivision (a) of this definition." 65 McKinney's Unconsolidated Laws Sec. 9806.

A further definition appears as follows:

"'Longshoreman' shall also include a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal

(a) either by a carrier of freight by water or by a stevedore physically to perform labor or services incidental to the movement of waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, including, but not limited to, cargo repairmen, coopers, general maintenance men, mechanical and miscellaneous workers, horse and cattle fitters, grain ceilers and marine carpenters, or

(b) by any person physically to move waterborne freight to or from a barge, lighter or railroad car for transfer to or from a vessel of a carrier of freight

by water which is, shall be, or shall have been berthed at the same pier or other waterfront terminal, or

(c) by any person to perform labor or services involving, or incidental to, the movement of freight at a waterfront terminal as defined in subdivision (10) of this section."

65 McKinney's Unconsolidated Laws Sec. 9905(6).

From these sources it is clear that longshoremen do more than load and unload a vessel. They move, handle and process waterborne cargo, from the time it comes into a waterfront terminal until it is put on board a vessel and from the time it is unloaded from a ship until it leaves the terminal, see *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs,* 540 F.2d 629 (3rd Cir. 1976).

Similarly, "longshoring operations" is not defined by the Act, but again the term is not limited to simply the loading and unloading of a vessel up to the "point of rest." "Longshoring operations" is a comprehensive term and involves a continuous process by which waterborne cargo moves through a waterfront terminal until it is fully loaded on board a vessel, or in the case of the removal of waterborne cargo from a vessel until it is delivered to the consignee's truckman.

Petitioners attempt to limit the meaning of maritime employment to simply loading and unloading of vessels in a direct line from the ship to the first "point of rest" or from the last "point of rest" to the ship. Nowhere in the use of the term maritime employment in the Act is there a limitation to loading and unloading. The only places in

the relevant sections of the Act where the terms loading or unloading are used are in the sections expanding the meaning of navigable waters, 33 U.S.C. 903(a), 902(4). Nevertheless, Petitioners use the loading and unloading language which Congress used to expand the navigable waters covered under the Act to limit the term maritime employment. This reading and/or interpretation is simply erroneous.

Even if the loading and unloading language is to be made a part of the definition of maritime employment, the terms are not words of art and should not be narrowly or hypertechnically interpreted, see *Litwinowicz* v. *Weyerhaeuser Steamship Co.*, 179 F. Supp. 812 (E.D. Pa. 1959); *Hagans* v. *Ellerman & Bucknall Steamship Co.*, 318 F.2d 563 (3rd Cir. 1963); *Garrett* v. *Gutzeit, O/Y*, 491 F.2d 228 (4th Cir. 1974). Further, a narrowly technical construction of the LHCA has been traditionally disfavored, see, e.g. *Luckenbach S.S. Co.* v. *Norton*, 106 F.2d 137, 138 (3rd Cir. 1939). The Court in the *Litwinowicz* case said:

> "Plaintiffs' actions at the time of the accident were direct, necessary steps in the physical transfer of the steel from the railroad car into the vessel, which constituted the work of loading." (179 F. Supp. at 817).

It should be noted that the plaintiff in this case was actually injured while inside the railroad car. Faced with the converse, the Court probably would have said that the work of unloading extends from removing the steel from the vessel to placing it inside the railroad car.

Petitioner in Caputo argues that Caputo was not engaged in maritime employment because the cargo was not in mari-

time commerce. We disagree. The obligation to unload a vessel is not terminated upon placing the cargo at a "point of rest" within the terminal area, but rather that cargo must be made available to a consignee so that it can be readily removed from the terminal area, see *American President Lines, Ltd.* v. *Federal Maritime Board*, 317 F.2d 887 (D.C. Cir. 1962). Respondent Caputo was completing the last necessary phase of unloading the vessel when he was placing the boxes of cheese within the consignee's truck when he sustained his industrial accident. He was, in effect, making delivery of the cargo to the consignee's truckman, which is the obligation of the shipping company, which obligation was contracted to the terminal operator. Holding that Caputo was engaged in longshoring operations is sufficient to uphold the decision of the Court of Appeals.

In the case of Respondent Blundo, Petitioner insists that the Amendments do not extend coverage to new categories of maritime employment. This position is expressly negated by the Committee reports at least as far as checkers are concerned. (Petitioner concedes that Respondent Blundo is a checker, see Blundo brief at p. 4). The Senate and House Committee reports both specifically included a checker within the amended coverage provisions of the Act, H.R. Rep. No. 92-1441, *supra*, at 11; S. Rep. No. 92-1125, *supra*, at 13.

The fact that a container was involved is not relevant. Stripping and stuffing a container is the functional equivalent of loading cargo on to a vessel and of sorting cargo discharged from a vessel. The use of containers permits a faster "turn around" time for a vessel by expediting the loading or unloading procedure of the vessel. The very

nature of containerization requires that more of the work that was previously done on board a vessel must now be done within the terminal area adjacent to where the vessel loads and unloads. Congress explicitly recognized this feature of containerization in S. Rep. No. 92-1125, at 13:

> "It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoremen's work is performed on land than heretofore."

The container is removed from the ship and then completely unloaded (stripped) on land. This is no different than the procedure involved before containerization, where the cargo was palletized and the pallet was removed from the vessel and had to be placed within the terminal area, again for the purposes of effecting delivery to a consignee's truckman.

At the time Respondent Blundo was injured, he was specifically engaged in walking around a container after breaking the seal on said container for the purpose of being stripped. He slipped and fell on ice within the terminal area while engaged in this longshoring operation. All of the cases in the First, Second, Third, Fourth and Fifth Circuits bearing on this point of law are in accord, *Stockman* v. *John T. Clark & Son,* 539 F. 2d 264 (1st Cir. 1976); *Pittston Stevedoring Corp.* v. *Dellaventura, supra; Sea-Land Service, Inc.* v. *Director, supra; I.T.O. Corp.,* v. *Benefits Review Board, en banc* decision, 542 F.2d 903 (4th Cir. 1976); *Jacksonville Shipyards, Inc.* v. *Perdue,* 539 F.2d 533 (5th Cir. 1976).

B. *The "Point of Rest" Theory Relied on by Petitioners Is Erroneous.*

The "point of rest" theory used by Petitioners to limit the scope of maritime employment, has been expressly rejected by four out of the five Courts of Appeals to which it has been presented, see *Pittston Stevedoring Corp.* v. *Dellaventura, supra* (2nd Cir.); *Sea-Land Service, Inc.* v. *Director, supra* (3rd Cir.); *Stockman* v. *John T. Clark & Son, supra* (1st Cir.); and *Jacksonville Shipyards, Inc.* v. *Perdue, supra* (5th Cir.). Even the Fourth Circuit, which accepted the "point of rest" theory, *I.T.O. Corp.* v. *Benefits Review Board,* 529 F.2d 1080, after an en banc rehearing, modified the "point of rest" to include the stuffing and stripping of containers, 542 F.2d 903, at 905, cert. pending (Nos. 76-706 and 76-730). The only other circuit to render a decision on this jurisdictional point is the Ninth Circuit in *Weyerhaeuser Co.* v. *Gilmore,* 528 F.2d 957 (9th Cir. 1975), cert. denied, 45 U.S.L.W. 3254 (1976). In the latter case, the facts and circumstances are completely different from the instant cases and did not involve longshoremen or longshoring operations. It is therefore distinguishable on its facts from the instant case, as pointed out by Judge Friendly in his decision, *Pittston Stevedoring, supra,* 544 F.2d, at 39.

Petitioners have cited numerous reports, contracts and other authorities to show that the "point of rest" is a commonly used and widely accepted term in the longshore industry. They have repeatedly argued that Congress was aware of the "point of rest" when it adopted the 1972 Amendments and therefore intended to extend coverage only up to the "point of rest." But their attempt to show that this theory was known throughout the industry and accepted by all those who work in the industry,

including the International Longshoremen's Association is negated by the Senate and House reports, as well as by the entire legislative history. Nowhere in the Committee reports is the so-called "point of rest" theory mentioned. Further, if it were so open and notorious and in the minds of everyone present at the time that the Amendments were under advisement, why wasn't such phraseology used at one time or another during the presentation of the position of either the employers or the ILA union representatives before each Committee of the Senate or House of Representatives?

The simple answer to Petitioners' argument is the one provided by Judge Craven in his dissent from the panel decision in *I.T.O. Corp.* v. *Benefits Review Board,* 529 F.2d 1080, namely:

> "If Congress, as appellants claim, meant to embrace the concept of the 'point of rest' as a demarcation line between 'maritime' and 'nonmaritime' employment, why was this 'generally understood' doctrine not explicitly written into Section 902(3) of the Act, defining 'employee,' or at the very least, mentioned in the legislative reports? *Surely a concept of such alleged widespread use and application is too conspicuous by its absence to be read into the statute.* This Court has no license to find in a statute words which the Congress did not put there." (at 1096, emphasis added)

Petitioners rely heavily on a Task Force Report of the Office of Workers' Compensation Programs (OWCP) to substantiate the "point of rest" theory. The Petitioners have taken out of context certain phrases used in an appendix of the Task Force Report but fail to mention

the definition of employee listed in Appendix A at page 98 of the Report:

> "Employee. Any person engaged in maritime employment, including any longshore worker or other person engaged in longshoring operation . . . "

This is basically the same definition as that being reviewed herein.

Respondents submit that the purpose of this report was simply to advise the Secretary of Labor of the problems that existed in the Office of Workers' Compensation Programs and to make recommendations for changes that would expedite the handling of cases under the Act. This is apparent in two transmittal letters dated December 15, 1976. The letter of John B. Mumford, Chairman, Departmental OWCP Task Force, clearly sets forth the assignment he was given:

> "Six months ago you asked me to establish a Departmental Task Force to undertake a thorough assessment of the operational problems which have impeded the Office of Workers' Compensation Programs in the conduct of its responsibilities under the Longshoremen's and Harbor Workers' Compensation Act.
>
> The Office of Workers' Compensation Programs Task Force has now completed its assessment and has developed a comprehensive set of recommendations which we feel will result in significant improvements in program performance. The report documenting these conclusions and recommendations provides a thorough, comprehensive series of action-recommendations . . . "

It is submitted that this particular Task Force Report is of no significance to the issues and should not be used as a basis for this Court's decision herein.

Further, all the cases cited by the Petitioner in Blundo on pages 54-57 of its brief to support the "point of rest" theory deal with a longshoreman's ability to avail himself of the unseaworthiness doctrine in third party actions. Whatever validity, if any, the "point of rest" theory has to the unseaworthiness doctrine, it has none when applied to the payment of compensation benefits under the LHCA. Under the seaworthiness doctrine, a longshoreman had to show he was acting in service to a ship to obtain recovery against the ship. However, under the amended Act, there is no such limitation. An employee must simply show that he is engaged in maritime employment. Included in maritime employment are longshoring operations. As we have shown above, longshoring operations encompass all the activities involved in moving, handling and processing cargo. They are not limited to those operations which are in service of a vessel.

The "bucket brigade" analogy which counsel for Amicus, West Gulf Maritime Association, utilizes is a gross oversimplification of the facts of life on the waterfront and consequently just does not merit consideration. The two cases relied on exclusively by counsel, involved the pre-1972 Act where coverage existed only if the accident occurred over the navigable waters (and beyond the pier). The 1972 Amendments removed this limitation. These same two cases can now be read to support Respondents. If the railroad workers were covered while they were over navigable waters under the old Act, they would continue to

be covered for the same activities now performed on land under the shoreward extension of the 1972 Amendments.

Finally, Petitioners argue that since the "point of rest" is widely used, it would be applied with consistency and certainty. But counsel for the Petitioner in Blundo makes two very important observations about the "point of rest" (Blundo brief at 36-37), which we believe would negate the very consistency and uniformity which Congress was trying to achieve when it amended the Act. First, the "point of rest" is not that location at the ship's side from which or to which cargo is loaded or unloaded. Rather, it is some other *temporary* storage or holding area. Second, Petitioners say it is not a geographic concept, but rather a functionally determined point. These two observations show quite clearly that the "point of rest" will vary from port to port and according to the nature of the cargo involved. It will also vary depending on whether the cargo is containerized or not, see Judge Craven's dissent, *I.T.O. Corp., supra* at 1096.

The "point of rest" would vary according to the whim of each and every individual employer. It would appear to be inconceivable that Congress would permit the expansion of the territorial limits of what constitutes navigable waters to be left to the independent judgment and/or manner of operation of each stevedoring company and/or terminal operator. The litigation involved herein indicates immediately the abuse which could be fostered by employers upon the coverage provisions of the Act, upon the intention of Congress to create a uniform system of compensation and upon longshoremen themselves who would again be walking in and out of coverage under the Act. It could be readily seen that each and every employer would immediately revise its operational system in such a

way as to make the "point of rest" as close to the vessel as possible, thereby limiting the compensation liability imposed by the amended provisions of the Act as much as possible.

As a concrete example of the inconsistency inherent in the "point of rest" theory, Respondents suggest the following: Assume certain cargo which had been unloaded from a vessel was taken to a shed to await further trans-shipment. Next to it in the shed was cargo waiting to be loaded on board a vessel. Assume further the cargo awaiting trans-shipment had remained in the shed 133 days. (Judge Friendly indicated such a time delay might have necessitated a decision against Dellaventura had the merits been reached in his case, *Pittston Stevedoring, supra,* 544 F.2d at 54, note 24.) Two longshoremen are working in the shed. One is moving the unloaded cargo to a truck for trans-shipment and the other is moving the other cargo to a vessel to be loaded. The cargo stored 133 days falls, injuring both longshoremen. Would only one longshoreman receive benefits under the Act because he was moving cargo from the "point of rest" to the ship? Would neither be covered because the cargo causing the injuries was beyond Petitioner's so called "point of rest"? Would both be covered if they have been injured, instead, by the cargo which was moving toward the ship?

Under the position of the B.R.B. both longshoremen would be covered regardless of which cargo was involved. We believe this to be the correct result. We submit that adopting the "point of rest" theory would directly contravene and frustrate Congress' attempt to provide uniform coverage to all longshore workers.

C. *Both Ralph Caputo and Carmelo Blundo Were Injured Upon Navigable Waters of the United States as Now Defined.*

Counsel for the Petitioner in case No. 76-444 concedes that Respondent Caputo was injured on the navigable waters as now defined.

> "The situs of Caputo's accident unquestionably met the requirement of Section 3(a) of the Act, 33 U.S.C. 903(a), because the terminal adjoins navigable waters of the United States and parts of the terminal area are used in loading and unloading ships." (Caputo Brief, p. 3, footnote 1)

On the other hand, counsel for Petitioner in No. 76-454 argues that Respondent Blundo was not injured at a situs covered by the Act. This is alleged because the pier where Blundo was injured was not "customarily used" in loading or unloading a vessel. Petitioner makes a fundamental error of statutory construction in so reading the statute. Further, Petitioner apparently heavily relies on the fact that the container was moved by an independent trucker over city streets.

The area covered under the term navigable waters, as far as the LHCA is concerned, has been expanded to include:

> "any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel." 33 U.S.C. 903(a).

There is no question or dispute that Blundo was injured on the 19th Street side of the pier terminal known as 21st

Street Terminal. Thus, he was injured on an area specifically included within the term navigable waters.

Petitioner attempts to read Section 903(a) as requiring all the specifically enumerated areas to be customarily used by an employer in loading or unloading a vessel. However, the phrase "customarily used" refers only to "other adjoining areas." It does not refer to "any pier . . . " etc. To read the Act as Petitioner contends would require a disregard of Congress' double use of the word "adjoining." In fact to read it as Petitioner contends makes the entire enumeration surplusage, since it would have been sufficient for Congress to say, "any adjoining area customarily used in loading, unloading, repairing or building a vessel." This Congress did not do. It specifically enumerated certain adjoining areas, of which a pier was one, and then included "other adjoining areas customarily used . . . "

Even in the Fourth Circuit Court of Appeals, which accepted a modified "point of rest" theory, the above reading of Section 903(a) was apparently adopted, *I.T.O. Corp., supra,* 529 F.2d, at 1083-4.

The First Circuit in a case involving circumstances almost identical to those in Blundo reached the same result, *Stockman* v. *John T. Clark & Sons, supra.* In *Stockman,* the claimant was injured while physically stripping a container. Blundo, working as a checker, was also injured while involved in the stripping of a container. The container in *Stockman* had been discharged from a vessel approximately three days before the accident, at a facility approximately two miles by land from the place of injury. In the case herein, the container was similarly discharged

from a vessel at a different place and, due to the nature of the cargo, transported overland to the bonded warehouse at the 21st Street pier. The Court in *Stockman* clearly held "that the situs requirement of Section 903(a) was plainly met, in spite of the distance separating Berth 5 of the Boston Army Base from the Sea-Land berth at Castle Island." 539 F.2d, at 271. Further the Court said:

> "On the question of situs, the simple fact is that the amended Act defines navigable waters to include 'any adjoining pier, wharf . . . terminal . . . or other adjoining area customarily used by an employer in loading (or) unloading . . . a vessel.' Section 903(a). 'Adjoining' can only refer to navigable waters; and Stockman was, as even Clark concedes, working at a terminal which adjoined navigable waters. To be sure, the final reference to 'other adjoining area customarily used by an employer in loading (or) unloading . . . a vessel,' as well as other parts of the statute, suggests that Congress had in mind a terminal associated with the shipboard movement of marine cargoes. But we do not think Congress meant necessarily to limit 'adjoining' to only those areas directly adjoining the berth of the specific vessel being unloaded . . . We are not faced with the stripping of a container at an inland freight depot having only some incidental connection with navigable waters. We therefore conclude, from all these factors, that the situs requirement of Section 903(a) has been met." *Id.* 272.

Similarly, Blundo was injured at a situs, a pier, specifically enumerated.

Further, even if a pier must be customarily used in loading and unloading, as shown above the activity in

which Blundo was engaged was part of the loading and unloading process. Stripping a container is the functional equivalent to unloading a vessel and this is what was being done at the pier. Thus, even under Petitioner's erroneous reading of Section 903(a), Blundo was still injured at a covered situs.

III.

The economic argument is one which is not properly addressed to this Court, but rather should be addressed to Congress.

Petitioner in Blundo, as well as the Amicus Curiae, argue that because of the interpretation adopted by the Department of Labor, and by the Courts of Appeals, the costs of compensation insurance has increased significantly. But as they themselves point out, Congress considered the question of a possible increase in compensation insurance.

Congress was aware that insurance rates would increase. Congress clearly intended to substantially raise the benefit levels from the $70.00 a week then provided. The first year alone, would see a minimum of a doubling of the compensation payment for covered workers, and the payment would continue to rise in 1973-74-75. In addition, Congress intended to expand the number of workers who would be covered by moving the jurisdictional line shoreward.

Congress certainly knew this would result in increased insurance costs. In order to offset the increase, third-party actions based on the unseaworthiness doctrine were eliminated. Both sides, employers and employees, accepted

the quid pro quo which Congress worked out. Both sides felt they had gained from the respective trade-offs. The employers accepted higher benefit levels and an extension of coverage shoreward in return for the elimination of the unseaworthiness claims by longshoremen. The employees accepted the reverse.

In retrospect, the employers feel they made a bad decision and now ask this Court for relief. Respondents submit that the employers are presenting their argument in the wrong forum. On the record herein, this Court is simply not in an appropriate position to even consider the argument. This Court can only review the record and determine whether the decision below is supported by substantial evidence in the record. See Point I, *supra*. The Task Force Report, *supra*, and the various reports of an increase in insurance rates are not in the record. Further, individual Respondents are not in a position to have access to such information as relied on by Petitioners, in order to rebut the contentions of Petitioners.

If Petitioners feel that Congress inadequately or improperly judged the probable rise in insurance payments the employers would have to pay, their remedy would be to address their grievance to Congress. Let them present to Congress their "point of rest" theory and face the representatives of employees before Committees of Congress empowered to hear evidence and make proper recommendations, rather than place on injured employees the burden of this expensive protracted litigation.

CONCLUSION

For the above reasons, Respondents Caputo and Blundo respectfully submit that the judgment of the Court below in these cases be affirmed with costs and attorneys' fees to Respondents as provided by 33 U.S.C. 928(a), (b). The fee application will be submitted under separate cover.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1976

No. 76-444

Northeast Marine Terminal Company, Inc. and
State Insurance Fund,
Petitioners,

v.

Ralph Caputo

and

Director, Office of Workers' Compensation Programs,
United States Department of Labor
Respondents.

No. 76-454

International Terminal Operating Co., Inc.
Petitioner,

v.

Carmelo Blundo

and

Director, Office of Workers' Compensation Programs,
United States Department of Labor
Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-444

NORTHEAST MARINE TERMINAL COMPANY, INC. AND STATE INSURANCE FUND,

Petitioners,

v.

RALPH CAPUTO

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents.

No. 76-454

INTERNATIONAL TERMINAL OPERATING CO., INC.

Petitioner,

v.

CARMELO BLUNDO

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Statement of Interest of *Amicus Curiae*

This Brief *Amicus Curiae* is filed on behalf of the International Longshoremen's Association, AFL-CIO (hereinafter "ILA") with the written consent of all parties in these cases. The ILA is a "labor organization" within the meaning of Section 2(5) of the National Labor Relations Act, as amended, 29 USC § 152(5). Its office and principal place of business is in New York, New York, the situs of the events and proceedings herein.

In addition to its status as the parent union of the local collective bargaining representatives of respondents Ralph Caputo and Carmelo Blundo, the ILA is the certified representative of all employees in longshore and related crafts who work at piers and terminals throughout the Port of New York, encompassing the states of New York and New Jersey.[1] ILA, directly or through its affiliated, subsidiary District Councils and Locals, represents in excess of 115,000 such employees engaged in the movement,

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[1] The certified unit is defined in *Matter of New York Shipping Association,* 116 NLRB 1183 at 1188 (1956) as:

> "All longshore employees engaged in work pertaining to the rigging of ships, coaling of same, loading and unloading of cargoes, including mail, ships' stores and baggage, handling lines in connection with the docking and undocking of ships, including hatch bosses, cargo repairmen, checkers, clerks and timekeepers and their assistants, including head receiving and delivery clerks; general maintenance, mechanical and miscellaneous workers; horse and cattle fitters, grain ceilers and marine carpenters, in the Port of Greater New York and vicinity. . . ."

Employees in the foregoing classifications are customarily designated "deepsea" longshoremen, an allusion to their location at dockside and engagement in work directly related to the loading and discharge of cargo aboard ocean-going vessels. The work of the employees in the various listed categories is interrelated to the point where employment of one group necessarily will result in correlative jobs for others within the certified unit, as will appear hereinafter.

handling and processing of cargo in maritime commerce on the East and Gulf Coasts of the United States from Maine to Texas, as well as on the Great Lakes.

It is reasonably self-evident from the title of the Act under consideration that ILA's membership, generally, and specifically as pertains to Blundo, Caputo and their fellow employees in the unit in the Port of New York, is directly affected by the provisions of this Act. Furthermore, the ILA is a joint Administrator of various welfare trust funds for employees in longshore and related crafts. Payments from these funds are—and will continue to be—disbursed in relation to the amount of compensation available to, and received by their beneficiaries, exemplified by Blundo and Caputo. For these reasons, ILA was permitted to participate in the proceedings before the Second Circuit, in which it filed a consolidated Brief *Amicus Curiae.*

As *amicus,* ILA relies on the essentially undisputed statements of facts set forth in the parties' briefs, particularly as detailed and recited by counsel for respondents Blundo and Caputo. ILA similarly concurs and joins in the arguments set forth in the latter's responsive brief, which, for the most part, were variously and thoroughly developed in Judge Craven's consummate Dissenting Opinion in *I.T.O. Corporation of Baltimore* v. *Benefits Review Board,* 529 F.2d 1080, 1089-1101 (4th Cir., 1975), *reh. in banc,* 542 F. 2d 903 (1976), cert. pend. sub nom. *Maritime Terminals, Inc.* v. *Brown* (No. 76-706, Nov. 19, 1976) and *Adkins* v. *I.T.O. Corp. of Baltimore* (No. 76-730, Nov. 24, 1976); in *Jacksonville Shipyards, Inc.* v. *Perdue,* 539 F. 2d 533 (5th Cir. 1976), cert. pend. sub nom. *Pfeiffer* v. *Ford* (No. 76-641, Nov. 10, 1976) (hereinafter "Ford"); in *Sea Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs (Wallace C. Johns),* 540 F. 2d 629 (3rd Cir. 1976) (hereinafter "Johns"), and, of course, in the majority opinion below.

Amicus' purpose in filing this brief is to address the issue of the extent of coverage under the 1972 amendments to the Act in the broad overview of these cases, so as to give the Court the benefit of the perspective of the employees employed as longshoremen and in longshore operations whom it represents. After all, they are actually or potentially the injured parties who stand most to gain or to lose from the Court's determinations in these and in related cases.[2]

We intend to buttress this perspective by appropriate references to the forecited and other relevant appellate decisions, consistent with the Act's continuing presumption in favor of claims. 33 USC § 920. These cases as well as other pertinent background materials cumulatively demonstrate that employees of vessel carriers and their shoreside stevedore and terminal agents, including those as Blundo and Caputo, who carry out the *initial* and *final* steps in the carriers' movement of that freight, were the concern of Congress and were intended to be covered under the 1972 amendments.[3]

Finally, *amicus* will endeavor to point out, dispel and correct fundamental misconceptions, inconsistencies and contradictions appearing in the briefs for petitioners and the NAS. These tend to conflict with the history and realities of waterfront employment respecting the movement of maritime commerce, and to lay bare the error of their arguments-in-chief.

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[2] Indeed, *amicus* National Association of Stevedores (hereinafter "NAS") acknowledges that the interest of the "injured worker" surpasses even its own interest and the interest of its member-companies, the private marine terminal and stevedore employers of longshoremen on all four coasts of the United States (NAS Brief at page 3).

[3] In view of the statutory presumption, it might be more aptly stated that petitioners have *failed* to meet their burden of proving that the coverage discerned by the Benefits Review Board (hereinafter "the Board") was *not* intended by Congress.

Counter-Statement of the Question Presented

Whether claimants, members of the multi-employer longshore bargaining unit in the Port of New York, who are employed exclusively at shipside piers and terminals by contracting employers, for the express purpose of furnishing services directly and indirectly incident to the movement of oceanborne cargo, could reasonably be found by the Benefits Review Board to be covered by the explicit definitions of "employee" and "employer" under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3), in view of the undisturbed statutory presumption in favor of federal (rather than state) compensation for work-related injuries sustained by them in the course of their employment (33 U.S.C. §§ 903(a) and 920)?

Argument

1. Introduction.

Amicus feels confident that the employers, who artfully seek to persuade this Court to restrict the coverage of the Act in order to reduce their workmen's compensation premiums, *would never,* in face-to-face negotiations with their employees' representatives, assert the ludicrous positions being pressed before this Court. They know full well that their longshore employees have handled *all* work in connection with the loading and discharging of ocean cargo on ships.

This assertion was recently confirmed by a statement of several of the various employers who are parties to the instant and related litigation, whether as petitioners or as members of the NAS. We quote from the brief of the New York Shipping Association ("NYSA") in *ILA and NYSA* v. *National Labor Relations Board,* —— F. 2d —— (No. 75-4266, 2nd Cir., June 29, 1976, cert. den., —— U.S. —— (Nos. 76-759, 76-760, Jan. 10, 1977):

> "[T]he traditional work of ILA longshoremen on the piers and docks is not limited to loading and unloading

ships. It never has been. The ILA's work jurisdiction extends beyond the vessel. Thousands of longshoremen are employed on pier terminals in addition to ship gangs. In fact, some 25,000 longshoremen, were employed before the [National Labor Relations] Board's decision, in stuffing and stripping local LTL and consolidated cargo. Historically, the ILA's exclusive, all-encompassing jurisdiction has enveloped all stevedoring activities at the extensive waterfront terminals in the Port of Greater New York.

"The ILA longshoremen's handling of cargo for ocean shipment involves not only the stowage and discharge of cargo to and from the vessel. It also deals with all the interrelated terminal functions in the movement of cargo across the piers from the tailgate of the delivery truck to the hold of the vessel for out-bound cargo and the converse for in-bound cargo. Such ILA work includes receipt, storage, sorting, checking, palletizing, cargo repairs, carpentry, maintenance and delivery." (Brief of Petitioner NYSA at page 10).

Thus, the longshore work described above includes exactly what the claimants herein were doing when they were injured. It ill behooves the petitioners and the NAS to come before the Court and now pretend that the work of Blundo and Caputo, as of their fellow longshoremen in the terminal shed, is not maritime employment. There should be no doubt that they are covered by the Act, whether engaged in stuffing, stripping, checking, delivering or any other assignment *given them by their maritime employers.* Certainly, at the time of their injuries, Blundo and Caputo *were not* employees of the trucking companies, or of any of the consignees' other agents. Any suggestions that their work, at the instance of the maritime employers, was in the employ of the trucking or consignee's agents, is at complete variance with the established history of the longshore unit and longshore operations in the Port of New York. They deserve summary rejection.

Amicus respectfully submits that petitioners and NAS postulate untenable premises and reach unacceptable conclusions. This is the outgrowth of their failure to grasp the larger, overall context of the records in these proceedings. These include: (a) the advanced and changed state of the industry at the time of the 1972 hearings and legislation, of which the Congress was fully and knowledgably aware; (b) the history of, and developments in, the longshore industry in the Port of New York, as reflected in the laws of New York and New Jersey governing their common Port, and in the annals of the National Labor Relations Board; and (3) the day-to-day occupations and mechanics of longshore practices and employment, in this port in particular, which in many—but definitely not in all—respects are comparable to those of other ports along the East and Gulf coasts of the United States.

2. Status of the industry in 1972 and to date.

The traditional work of the ILA longshoremen and allied craft workers underwent a drastic transformation in the mid-1960's when automation approached the piers and terminals in East Coast ports. Gone are the slings, bailing hooks, and hand trucks. In their place are huge 20′ by 40′ metal containers and terminal sheds where these containers are "stuffed" (loaded) with, and "stripped" (unloaded) of, non-unitized cargo.

It is incontestable that containerization has moved the locus of longshore work land-ward. Longshoring operations in a modern container port facility take place geographically several hundred yards from the water's edge. The modern container terminals which now exist in the major ports, including the Port of New York, cover large sprawling areas, necessarily so to provide immense container marshalling-storage areas, stuffing and stripping sheds and gigantic, pier-side cranes that hoist the containers aboard—and remove them from—the ships. Congress was well aware of this fundamental and drastic shift

in the locus of longshore activities. Thus, the pertinent Congressional reports state:

> "It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-Type vessels, more of the longshoreman's work is performed on land than heretofore." (1972 U.S. Code Cong. Adm. News, vol. 3, pages 4707-4708, 92nd Congress, 2d Session, entitled: "Extension of coverage to shore-side areas.")

The foregoing specific reference to containerization and its effects clearly evinces Congress' understanding that the historic patterns in the movement of maritime cargo have been restructured to accommodate the advent of containerization. Also, that "maritime employment" and "longshore operations" must be (re-)defined and understood in the context of the movement of ocean-going cargo in—and by—containers. *Ergo,* it cannot be gainsaid that the claimants are precisely those persons to whom Congress sought to extend coverage and protection under the Act.

The cargo is no longer put directly in the ship's hold. There is no work in the hold. Each container is a module. Cumulatively, the containers function as a ship's hold. *Leather's Best* v. *S.S. Mormaclynx,* 451 F. 2d 800, 815 (2nd Cir. 1971). The cargo-handling aspects of longshore work are performed in relation to these mobile parts of the ship, rather than to the ship at anchor. Modernization of operations, whether through new equipment or novel divisions of labor, does not in any way change its maritime character. See, e.g., *Huff* v. *Matson Navigation Co.,* 338 F. 2d 205, 212-213 (9th Cir., 1964). It follows that so long as "the jurisdiction nexus", i.e., "the function being performed by the injured employee [related to] waterborne transportation" is maintained, the injury is compensable under the Act. (*Johns, supra,* 540 F. 2d at 638).

3. The rationale and legal basis supporting the nexus of employment and insurable interests as the statutory criteria.

Petitioners' and NAS's references to contract law, tort law and other common-law and statutory schemes not directly bearing on the employment relationship between unit employees and their stevedore and terminal employers, cannot overcome the statutory presumptions. For it is *that* relationship—and none other—that permeates, and is articulated by, the statutory definitions. It alone gives rise, *ab initio,* to grounds for compensation— *workmen's* compensation. These grounds are unrelated to pre-amendment third-party liabilities, to the status of the cargo time-wise, or to any other consideration that does not require an employee of the insured employer to perform an act which places him in an injury-prone situation.

ILA therefore submits that the only relevant question in determining compensability is: whether or not the injury was an outgrowth of the employment relationship. If the answer is affirmative, then the following can reasonably be deduced:

(a) the employment of Blundo, Caputo and like unit employees were for employers engaged as vessel carriers, or in providing services to or for such carriers, as stevedores or ocean terminal operators; (b) such employers are part of the overall collective bargaining structure governing employment in the maritime industry; (c) the terms and conditions pursuant to which they are employed are set forth in Agreements which, specifically and generically, contemplate only their employment in handling ocean cargo and maritime-related functions on docks, piers and terminals, the *exclusive* situs of longshore unit work; (d) those Agreements, just as the pertinent portions of the maritime employer's business herein covered by those Agreements, do not call for work on behalf of the consignees, or of their trucking agents; (e) the employers

are being insured, as required by law, while—and because—these employees are performing their assigned work, under the collective bargaining agreement. *Ergo,* compensability and the terms of compensation for work-related injuries—so long as occurring on the statutorily-prescribed situs of longshore unit employment—are within the four corners of the amended Act.

A Fortiori, the Act totally encompasses longshoremen, except in the instance that a unit employee could ever be found to be an employee of the consignee or its delivery agent, in the final phase (or step) of handling the cargo on the terminal premises. This reasoning is so far-fetched as to border fantasy. The consignees and their agents are not—and cannot be—parties to the longshore Agreements, which set and define the employees' wages and fringe benefits (See *Intercontinental Container Transport Corporation* v. *NYSA, Inc. and ILA,* 426 F.2d 884 at 889 (2nd Cir. 1970) (hereinafter "ICTC"). Moreover, the terminal shed workers remain on the payrolls of their regular employers in the course of delivering the maritime cargo to the consignees' trucking agents. (Note: the age of the "public loader" is ancient history).

The Third Circuit, in *Johns, supra,* thus properly looked to the "presence of a nexus between the employer-employee relationship and maritime commerce." It stated that "it is the existence of this special employer-employee relationship, and not the situs of that relationship, that is significant for purposes of admiralty jurisdiction," 540 F.2d at 636, citing *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202 at 204, 214 (1971) and *Gutierrez* v. *Waterman Steamship Corp.,* 373 U.S. 206 (1962). That Court, viewing the problem "from a fresh perspective" which it described as "functional and not spatial," *ibid.,* proceeded to conclude that:

> "[t]he line which Congress intended to draw was between the maritime commerce and land commerce, and the coverage of the federal law starts at the point where the cargo passes to or from an employer engaged in the former to an employer engaged in the latter." (540 F. 2d at 639.)

This "line" of demarcation is the only natural and arguable one within the purpose and scope of the Act. It tracks the gamut of the injured employee's (and of his employer's) activities *vis-a-vis* the cargo.

Amicus respectfully submits that there can rarely be a more definitive description of a person's occupation or employment status than that conferred by law and by regulatory bodies. We request the Court to take judicial notice that longshoremen, including checkers, are licensed by the Waterfront Commission of New York and New Jersey. The Commission was established to implement the "Waterfront Compact" of the Port of New York.[4] That Compact contains definitions of industry terminology and operations[5] of singular significance to the issues of these cases,

---

[4] *Waterfront Employment and Air Freight Industry Regulation,* McKinney's Unconsolidated Laws of New York, § 9801 et seq. The corresponding New Jersey law is at § 32:23-6, N.J.S.A.

[5] The following Bi-State Compacts definitions are found in the New York version at § 9806 of McKinney's, *supra:*

"Longshoreman" shall mean a natural person, other than a hiring agent, *who is employed for work at a pier or other waterfront terminal,* either by a carrier of freight by water *or by a stevedore*

(a) physically *to move waterborne freight* on vessels berthed at piers, on piers or at other waterfront terminals, or

(b) to engage in direct and immediate checking of any such freight or of the custodial accounting therefor or in the recording

(*footnote continued on following page*)

on several grounds. They were devised and agreed upon by knowledgable persons on both sides of the harbor and of the employment relationship, who have abided by them for almost a quarter century. They thus reflect the customs and practices in the industry which can serve as guides to finding and defining the scope of maritime related activities and employment. Of most importance herein, they comprise the only available insight into the Congressional contemplation and intendment with respect to "longshore operations" in the long hiatus between the 1927 and 1972 versions of the Act's coverage. The Compact required the consent—*ergo,* approval—of the Congress. Act of August 12, 1953, C. 407, 67 Stat. 541.

The petitioner in *Caputo,* as well as the NAS, concede that the legislative history of the 1972 amendments pertaining to the extension of the Act's coverage shoreward is "meager" (*Caputo* brief at pp. 7-8 and fn. 5 thereto; NAS brief at p. 9).[6] They therefore interpolate whatever inconclusive history that is available on the 1972

(*footnote continued from preceding page*)

or tabulation of the hours worked at piers or other waterfront terminals *by natural persons employed by carriers of freight by water or stevedores,* . . .

"Pier" shall include any wharf, pier, dock or quay.

That the Petitioners' and NAS's attempts to differentiate "Stevedores" from "Terminal Operators" is to draw a difference without a distinction under the Act's definition of an "employer". This is also shown by the following Compact definition consistent with the Commission's licensing of employers who operate in the Port:

"Stevedore" shall mean a contractor (not including an employee) engaged for compensation pursuant to a contract or arrangement *with a carrier of freight by water,* in moving waterborne freight carried or consigned for carriage by such carrier on vessels of such carrier berthed at piers, on piers at which such vessels are berthed or at other waterfront terminals. (Emphasis added)

[6] References to the briefs of the petitioners in *Blundo* and *Caputo* and of NAS are referred to by name and page (e.g., *Blundo* Brief at p.).

changes to support their positions, though it is obvious that the several Courts that have struggled with these problems have been able to reach opposite conclusions derived from the very same Congressional reports.

ILA submits that the definitions in the Compact tend to illuminate the "silent" area in the legislative history of the instant Act which has given rise to the present plethora of litigation.[7] *Amicus* further submits that it

[7] "The problem with which we are here concerned arises from Congress' failure to supply any definition of two terms in § 902 (3)—engaged in maritime employment and 'any longshoreman or other person engaged in longshoring operations'." (Appendix, *Caputo* Petition at 9a, quoting from the decisions below.) However, the Court in *Johns, supra,* seems to best describe this "no-man's land" of contention as follows:

> "In our view, if Congress had wished to adopt the 'point of rest' as the test for coverage, it would have made that intention clear. As it is, the 'point of rest' analysis is to be found neither in the statute itself nor in the legislative history. The closest approach to such a test appears in the following passage from the House Report:
>
> 'To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area . . . [E]mployees whose responsibility is only to pick up stored cargo for further transhipment would not be covered. . . . H.R. No. 92-1441, 1972 U.S. Code Congressional & Administrative News, at 4708.'
>
> "In our opinion, these remarks establish no more than that workers who bring cargo to a storage area from on board ship are covered, while those persons (generally truckers or railroad pesonnel) who merely receive cargo and transport it inland are not covered. *The House Committee in this passage did not even mention those employees who handle cargo between the first holding area and the cargo's departure via land transportation. It is precisely the treatment of this intermediate group of workers with which we are here concerned, and this passage is totally silent as to them.* Elsewhere, as we

(*footnote continued on following page*)

should be evident from the terms governing the application of the Compact, that the activities of a "longshoreman", *per se,* are not confined to carrier-related operations at a wharf, pier, dock or quay. ILA believes, consonant with its long and intimate experience, that it is obvious that the Waterfront Compact views "longshoring operations" as encompassing the full range of maritime cargo-handling activities while under the direction, control, jurisdiction and responsibility of the carrier, its stevedore agent and the terminal agent-employer, *at all stages* throughout the waterfront terminal, until carted away by the consignee. It manifestly follows the very "nexus of employment", of which petitioners and NAS display a surprising lack of either knowledge or candor.

For example, the petitioner in *Blundo* claims that "Blundo is not a longshoreman", since "[i]n industry practice and parlance, a checker is not considered a longshoreman, nor is he normally part of the longshore gang hired to load or unload a vessel." (*Blundo* Brief at pp. 9, 19-20; See NAS Brief at p. 30). In advancing this "gang-oriented" approach, this petitioner, like the petitioner in *Caputo* and the NAS, would have the Court believe that Congress purported to do no more than to correct the immediate dilemma "at the water's edge" resulting from this Court's decision in *Nacerima Operating Co.* v. *Johnson,* 396 U.S. 212 (1969). At the same time, they ask the Court to look to other, indistinct criteria such as "point of rest" and to such indistinguishable factors as the scope of work of a longshore gang as compared with other movements of

(*footnote continued from preceding page*)

> have seen, the Committee indicated that employees who are directly involved in loading or unloading will be covered by the new Act. In the absence of explicit language which would establish a 'point of rest' dividing line for shoreside cargo handlers, we will apply this general test to them as well." (539 F.2d at 540; footnotes omitted.)

cargo discharged from vessels on or away from the terminal premises. (See, e.g., *Caputo* Brief at p. 21; *Blundo* Brief at p. 22).

It is a matter of public record that the classification of "checkers", descriptive of Blundo's title and functions, is an integral component in the definition of the certified unit encompassing longshore operations in the Port of New York. The unit was defined by the National Labor Relations Board in *Matter of New York Shipping Association, supra,* note 1. Successive collective bargaining agreements covering this overall certified unit and its component classifications have been negotiated between the NYSA (on behalf of its member carriers, stevedores and other employers of longshoremen and related crafts in the Port of New York) and ILA (on behalf of its members in affiliated locals). These agreements are consistent with the broad view of longshoring operations envisioned by the definitions and practices under the Waterfront Compact, *supra.*

Thus, all employees employed at waterfront terminals in the Port of New York who fall within the definition of the longshore unit and who therefore are covered by longshore Agreements are included in *the same* seniority system, are paid *the same* range of wages, are covered by *the same* longshore pension and welfare plans, and, significantly, are *all* beneficiaries of the unique, precedent-setting Guaranteed Annual Income system, which prevail in that port. In the event that checkers such as Blundo or general longshoremen (including terminal laborers) such as Caputo are injured in the course of their employment, they, like other members of the certified longshore unit, are entitled to use the facilities of the joint-industry medical clinics and to receive supplemental benefits available to other employees in related cratfts, as defined. Yet, petitioners contend that for compensation purposes ***alone*** they should be treated differently.

Certain inferences and conclusions necessarily follow from the foregoing.

Any claim that Blundo and Caputo are *not* longshoremen or are not engaged in longshore-related operations are specious and unrealistic. The asserted requirement that they be members of a longshore "gang" completely overlooks: (a) the fact, which is patent from the perspective of the longshore employee and which is admitted by petitioners (*Blundo* Brief at pp. 17-19; *Caputo* Brief at pp. 10-11), that inasmuch as modern container operations rarely require employees—including checkers and even members of the longshore gangs—to go aboard the vessels, the relation of their shore-based work to "the water's edge" dilemma in *Nacerima,* is non-existent. Consequently, their handling of containerized cargo is indistinguishable in all respects from handling of the same cargo by Caputo and Blundo in the terminal shed; (b) that "gang" members are part of *the same* bargaining unit and are covered by the same master collective bargaining agreement covering the checkers and other longshoremen in the shed, to which *the same* employers individually and/or collectively subscribe; (c) that the attempted comparison between the longshore-unit handling of containers, including stuffing and stripping work, with similar work performed by other units, at inland terminals or manufacturing facilities, subject to clearly dissimilar terms and conditions of work, is like the proverbial comparison between apples and oranges. (*Blundo* Brief at pp. 40-42; NAS Brief at pp. 30-31. See *ICTC, supra,* 426 F. 2d 884 at 889); (d) that the NAS's preoccupation with the extinct "public loader" (NAS Brief at p. 17, *et seq.*) is a resurrection of 25-year-old skeletons, which can have no bearing on the industry as it has developed following the Waterfront Compant and unit certification and in light of the well-established collectively-bargained customs and practices over the past two decades; and (e) that any fragmentation of the longshore unit by dint alone of a hiatus of time is entirely irrelevant, so long

as the employees are injured while they are employed by an "employer" within the definition of the Act as terminal employees in connection with the handling of cargo unloaded from a vessel. (See section 2, *supra.*)

4. Congress should not be presumed to have intended an injustice.

Petitioners would have this court rule that some of these longshoremen, if they are injured in the course of their employment, suddenly, and for only one purpose, cease to be longshoremen. *Quare:* Do the petitioners continue to be stevedores or terminal operators during the period that the claimants aren't longshoremen? Of course they do, and their longshore employees continue to be longshoremen, even if they get hurt. And should a longshoreman, in order to protect his coverage under the Act, require his employer to post signs as to which cargo is still in maritime trade and which is not? We submit that the situations posited by these questions are no less absurd than petitioners' distinctions.

This Court may discern, as does *Amicus,* an inherent incongruity in the disparate treatment of members of the identical longshore unit, who suffer indentical injuries caused by the sudden movements of the same piece of cargo, or in the course of performing miscellaneous functions relating to the same piece of cargo, whether or not inside or outside of the containers. This was poignantly pointed up in *Ford, supra,* at 539 F. 2d 533 (No. 75-2289, *Diverson Ford*), where the Fifth Circuit commented:

> "Petitioners' apparently concede that Ford would be covered if his work were part of a continuous operation which began with the cargo's departure from a ship's hold. As respondents correctly point out, we are being asked to deny coverage purely because of a discontinuity in time created by the cargo's having been stored for awhile along the shore. . . . The

> work which Ford was performing was evidently an integral part of the process of moving maritime cargo from a ship to land transportation." (See also, *id.* at 544 (No. 75-4112—*Will Bryant*)).

ILA respectfully submits, again from the longshoreman's perspective, that the fortuitousness of a job-related accident befalling an employee in a longshore or related craft who is working for a maritime employer in one capacity rather than another, should bear no relationship whatever to the employee's entitlement to recovery under the Act. In order to move maritime cargo, whether in break-bulk or in containerized packaging, the services of employees in a full "range of peripheral job opportunities" is *required* by the maritime employer. (See *ICTC*, 426 F. 2d 884 at 891). Consistent with this concept, which is borne out by the unit description and contractual coverage, are the characteristics of the operations of the Waterfront Commission employment system:

> Unit employees are either on lists of gangs assigned to particular piers or terminals or, when furloughed from such list or when not working as part of an established gang at a designated pier or terminal, longshore employees must make themselves available on a "prior-day-order" basis for work. They are then routinely assigned to jobs by the employers' dispatchers in accordance with availability of work within the Port. (See, e.g., *Statement of Facts, Caputo* Petition at p. 2.) The very interchangability built into the system, whether on the same pier or between sections of the port, demonstrates that there is an integrated relationship between the various job functions, whether termed as: "gang", "terminal labor" or other classification. This tends to defeat any attempt to segregate the various positions of employment by title or classification (See, e.g., *Blundo* Brief at pp. 31-32) from the tailgate of the truck to the deck or hold of the

> vessel *and vice versa*. (See also quote from NYSA's Brief, *supra*, at section 1.)

Petitioners further seem to contend that the very remoteness of time, distance or activity from the side of the vessel where the "gang" is employed, should cause denial of coverage and relief to persons such as Blundo and Caputo. Ironically, the Second Circuit in *ICTC* found exactly to the contrary. In discussing the effects of off-pier stuffing and stripping of containers on pier-side employment, the concurring judge perceptively remarked:

> "If a substantial amount of stripping and stuffing is diverted to separate container stations where activity is not continuous, the ILA could well anticipate that parts of the existing piers or docks would be closed down with a net loss of longshoremen's jobs." (426 F. 2d 884, 891; Anderson, C.J.)

The significance of this accurate observation, which is being realized at the present time in the Port of New York as the result of a decision of the National Labor Relations Board unrelated hereto, is that a decline—or siphoning off—of activity *performed in the terminal shed* has a telling impact on other work opportunities on the dock *all the way up to shipside* (i.e., affecting even the "gangs").

5. "Point of Rest" is anomalous. The Board's decisions are well-founded in law and on the facts.

From the vantage of the longshoreman in the Port of New York, there is no "mystery" behind Congress' coverage of "all of the large number of persons who participate in waterfront freight-handling up to and including the point of delivery to the consignee (in the case of import cargo) or receipt from the consignee (in the case of export cargo)." (*Blundo* brief at p. 17). Did not this Court in *Nacirema, supra*, while denying coverage there, concurrently recognize that if the legislatively-defined coverage under the (1927) Act was to have been extended shoreward,

then:

> "Congress might have extended coverage to *all* longshoremen by exercising its power over maritime contracts." (396 U.S. at 215; footnote omitted) (emphasis added).

Congress plainly intended by the 1972 Amendments to eliminate the differences in compensation coverages for injuries suffered in the longshore handling of cargo transported by vessels. As it did not stop at "the water's edge", it must be presumed to have gone further. As shown above, Congress unmistakably did not act in a vacuum of knowledge or information of advanced longshore operations. But neither did it extend coverage in the context of a "point of rest" an anomalous, peripatetic concept not encompassed by the pre-1972 Act.[8] If Congress truly meant otherwise, then surely it had the opportunity to clearly and unequivocally "draw the line" and/or to qualify the "presumption" in Section 920 of the Act.

It did neither and "there's the rub"! Instead of engaging in "line-drawing", a difficult, precise and complex task, it chose to take a functional, sensible and practical work and cargo-oriented approach. It took long-overdue cognizance of the indivisible interrelated and integrated panoply of "longshore operations". Rather than restrict coverage and merely change the pierside longshoremen's bounds, it removed the restraints and gave him the same sense and degree of protection accorded his brother on the vessel and the string-piece. As Judge Craven aptly and amply showed, the language of the Amendments is clear and applicable. *Adkins, supra,* 529 F. 2d at 1094-195. If the employers are dissatisfied and feel beleagured by the costs,

[8] That "point of rest" may be relevant to other aspects in the handling of cargo in the course of longshore employment *is not* determinative of compensability for injuries. Rather, the "nexus" of the employment relationship is determinative, as discussed above at sections 2 and 3.

then their pleas should be directed to the legislature—not Courts.[9]

The Board is, therefore, fully warranted in interpreting and administering the Act, as required of it by Congress. It did so within the parameters of the revised definitions of the Act, which the Act itself instructs the Board to liberally construe. Applicable precedents permit no other conclusion.

Though the premise of "point of rest" is appealing, it surely is not convincing. At the very least, it did not convince the members of the Benefits Review Board, who were selected to fill positions on the Board in consideration of their expertise in the industries covered by the Act. Accordingly, their consistent determinations in the instant and related cases, all of which arose subsequent to the 1972 amendments, should not be disturbed unless the records in these, as in the other cases, are wholly unsupportable on the facts or are unmistakably in contravention of the letter and discernible purpose of the Act.

Two Fundamental Irregularities

We request the Court's indulgence on two final points.

A. *Amicus'* position essentially coincides with that of the respondents, who seek affirmance of the decisions below. We nevertheless urge the Court to issue a determination consistent with that of the Board rather than that of the Court of Appeals. In this respect, we are in accord with

[9] Assuming, *arguendo,* that "point of rest" is a criterion, then the Board and the Courts will be required, under the theories propounded by the petitioners and NAS, to continue to strain under the facts of each and every case, differing from port to port and possibly from incident to incident, in deciding whether any particular claim or classification of claimant is or is not covered. Such a result is irrational, confusing, and unwarranted. It is the product of erroneous miscomprehensions of longshore operations and of the 1972 amendments.

petitioner in *Caputo,* who similarly detects an anomaly in the Court's suggested requirement that the Board must find that claimant "has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel" (Appendix to *Caputo Petition* at page 42; *Caputo* Brief at pages 10-11). We have no desire to repeat our arguments above, except to note that under the present state of longshore activity, it is increasingly the case that properly included employees do not venture aboard vessels. Even the petitioners seem to recognize this fact of life, and neither of them appears to seek to make it a condition for recovery.

B. *Amicus* takes exception to references in the briefs of petitioners and NAS to a purported survey produced by the NAS, entitled: "Stevedore and Marine Terminal Practices at the Ports of the United States". It is referred to and cited in various portions of the briefs and appendices.

We ask the Court to take notice that this document was never entered into evidence in the record herein or in the record of any other related or unrelated proceeding under the Act. It was neither subject to examination or cross-examination nor was it otherwise tested for accuracy or admissibility under the evidentiary rules applicable to Board and Court proceedings on review. It was *not* a part of the record before the Court of Appeals for the Fourth Circuit, nor was it a factor in the determination of the Benefits Review Board or any of its Administrative Law Judges. There is therefore no support whatever for an inference at footnote 34 at page 31 of NAS's brief that this document was part of the record in the Fourth Circuit or that it was ever considered by that Court. It remains nothing more than a self-serving, unverified memorandum, which does not rise even to the level of a law review article in view of its partisan authorship. We pray that the Court will not give it any significance in its consideration or deliberations in these cases, as it is no probative value.

CONCLUSION

The decision of the Court of Appeals for the Second Circuit in these cases should be affirmed, to the extent that it reflects the conclusions and determinations of the Benefits Review Board.

Respectfully submitted this
9th day of March, 1977.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-444

NORTHEAST MARINE TERMINAL COMPANY, INC. AND STATE INSURANCE FUND,
Petitioners,

v.

RALPH CAPUTO

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Respondents.

No. 76-454

INTERNATIONAL TERMINAL OPERATING CO., INC.
Petitioner,

v.

CARMELO BLUNDO

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF STEVEDORES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-444

NORTHEAST MARINE TERMINAL COMPANY, INC. AND STATE INSURANCE FUND,
Petitioners,

v.

RALPH CAPUTO

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Respondents.

No. 76-454

INTERNATIONAL TERMINAL OPERATING CO., INC.
Petitioner,

v.

CARMELO BLUNDO

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF STEVEDORES

STATEMENT OF INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is filed on behalf of the National Association of Stevedores (hereinafter "NAS") with the written consent of all parties to these cases. The NAS is a nonprofit corporation incorporated on January 30, 1975 pursuant to the District of Columbia Nonprofit Corporation Act, 29 D.C. Code 1001 *et seq.*, for the purpose of promoting, furthering and supporting the stevedoring and marine terminal industry in the United States, its territories and possessions. It is the corporate successor to the unincorporated association of the same name organized in the District of Columbia in 1933. It has been given tax exemption rulings by both the Government of the District of Columbia and the Internal Revenue Service. Sec. 1005(b) of Title 29 of the District of Columbia Code specifically provides that a nonprofit corporation shall have the power to sue and be sued, complain and defend, in its corporate name.

The present membership of the NAS comprises 60 private marine terminal and stevedore employers doing business in ports on the nation's four seacoasts and the state of Hawaii. Based upon U.S. government manhour statistics for calendar year 1974 it is conservatively estimated that NAS member companies are responsible for over 70 percent of the industry's total manhours in all U.S. ports.

The member companies of the NAS employ the majority of U.S. dock and privately employed marine terminal labor, some of whom may be entitled to federal Longshoremen's and Harbor Workers' Compensation Act,[1] (hereinafter the "LHWCA") and some of whom may be subject to state workers' compensation laws. The NAS member companies are directly responsible for workers' compensation payments under both federal and state

[1] 33 USC § 901 *et seq.*

law either as self-insureds or through insurance carriers licensed by the U.S. Department of Labor or state insurance commissions.

Thus, the interests of the NAS and its member companies in the outcome of any litigation concerning the scope of benefits and jurisdiction of the federal LHWCA is second to none, except the injured worker, and far surpasses that of the governmental entities which merely administer the statutes, state or federal.

LHWCA insurance costs, be it premiums paid to licensed carriers, or benefits paid directly to employees, are the second largest cost of a private marine terminal operator or stevedore company, exceeded only by direct payroll expenses. Any decision by this or any other Court or administrative body as to which employee is entitled to federal LHWCA benefits and which is entitled to state compensation benefits has a direct and substantial economic impact upon each and every member of the NAS. For these reasons, the NAS has been authorized and directed by its member companies to appear on their behalf in all appropriate Courts until the industry-wide issue of state and federal jurisdiction in the matter of workers' compensation is finally resolved. Pursuant to that mandate the NAS participated as a party before the Benefits Review Board, U.S. Department of Labor and before the Fourth Circuit Court of Appeals in both the original hearing and *en banc* rehearing in *I.T.O. Corporation of Baltimore et al.* v. *William T. Adkins et al.*, now before this Court *sub nom William T. Adkins* v. *I.T.O. Corporation of Baltimore and Liberty Mutual Insurance Company and National Association of Stevedores*, No. 76-730. In addition, the NAS appeared as *amicus curiae* before the Second Circuit Court of Appeals in the matters which are the subject of this proceeding, and at the request of the Court participated in oral argument as well as submitting a brief *amicus curiae*.

Accordingly, the NAS submits this brief *amicus curiae* to the Court for its consideration in the matters now pending before it.

QUESTION PRESENTED

The issue before this Court may be simply stated as:

Where did the Congress in 1972 draw the line between federal LHWCA benefits and state workers' compensation laws and benefits and, were the injured "employees" performing the functions intended by Congress to be subject to federal LHWCA benefits at a location to which Congress extended the coverage of the LHWCA?

THE FACTS

The facts in each of these consolidated cases are not in dispute.

In No. 76-4444, Ralph Caputo was inside a consignee's truck assisting the truckman in loading cases of cheese into the truck when he tripped and hurt his foot. The cases of cheese had been unloaded from an ocean vessel some five days prior to Mr. Caputo's injury. At the time of his injury Mr. Caputo was employed as "terminal labor" by petitioner, Northeast Marine Terminal Company, Brooklyn, New York [Pet. A. 11a][2]

In No. 76-454, Carmelo Blundo was employed as a cargo checker by petitioner, International Terminal Operating Co. (ITO) and was working with a crew of men who were removing cargo from a container at the 19th Street Pier of ITO, Brooklyn, N.Y. when he slipped on ice and fell. The container with which he was working had been discharged from an ocean vessel by another

[2] References to the appendix to petitions for writs of certiorari are designated herein as "Pet. A. ——."

employer (not a party hereto) at a pier in Staten Island, New York and had been trucked over the city streets to Brooklyn to the ITO facility, which was not used by ITO for the loading or unloading of vessels. [Pet. A. 9a-10a]

SUMMARY OF ARGUMENT

The NAS believes that when Congress amended the LHWCA in 1972 to extend its coverage shoreward from the water's edge, that Congress intended to limit the shoreward intrusion and usurpation of state workmen's compensation laws for a specific group of employees working in a specified area adjoining the navigable waters. The NAS believes that only those employees injured while performing vessel loading and unloading functions traditionally performed by longshoremen at places customarily used by their employers to load or unload vessels were meant to be entitled to federal LHWCA benefits.

It seems abundantly clear that the functional line of demarcation between traditional longshore operations and the line between vessel loading or unloading and inland transshipment is the "point of rest" (place of rest, marshalling yard or storage area)—a line of functional demarcation long known and observed by employee, employer, the courts, federal regulatory agencies, writers, sociologists, and the public. It is at the "point of rest" that vessel unloading terminates in the case of import cargo and where it begins in the case of export cargo. No other place on the terminal or functional line of demarcation between the type of operations, employees or employers exists which more precisely coincides with the expressed intent of the Congress.

Whether called "point of rest," "place of rest" or any other local descriptive name, the "point of rest" and its attendant functional and operational divisions are exactly the same at every port in the United States and are

clearly understood and readily discernible by all parties involved in the movement of waterborne commerce in this country.

The truck loading functions of Ralph Caputo and the shipping van or container stripping function of Carmelo Blundo are neither traditional longshoring functions nor maritime employment within any meaning known to industry anymore than any other strictly land-based handling or watching of cargoes which may have been or are destined to be carried by vessels on navigable waters. The unwarranted extension of admiralty jurisdiction and federal LHWCA coverage shoreward of the "point of rest" into traditional land-based functions performed by land-based employees destroys the uniformity of the compensation system envisaged by the Congress and creates manifest economic and competitive disadvantage to private employers which was neither contemplated nor intended.

For these reasons, the NAS believes that the Benefits Review Board and the Court below both erred in awarding federal LHWCA benefits to Ralph Caputo and Carmelo Blundo, and that those awards must be set aside by this Court in a manner that will terminate future litigation in this troublesome and costly controversy.

ARGUMENT

The 1972 Amendments to the LHWCA—A Jurisdictional Line Was Moved

In 1972, the Congress substantially amended the LHWCA by enacting PL 92-572 which, in addition to the amendments here in controversy, substantially increased benefits payable to eligible injured employees; eliminated third party actions by injured longshoremen against vessels predicated upon seaworthiness; and declared void as against public policy indemnification

agreements between the stevedore and vessel owner. *Landon* v. *Lief Hoegh and Co., Inc. et al.*, 521 F.2d 756 (2nd Cir.—1975).

In addition to the aforementioned amendments Congress also changed the statutory definitions of (a) "employee" [3] and (b) "employer" [4] and extended shoreward from the water's edge the situs of injuries for which federal LHWCA benefits could be paid to an employee meeting the new definition of section 902(3) working for an employer as defined in section 902(4).

Congress extended shoreward the jurisdictional line between federal and state compensation laws only for a certain specified type of employee. The questions are how far shoreward was the line moved, and for which employees. Prior to 1972 that line lay shipside at the water's edge—the so-called *Jensen* line. *Southern Pacific Company* v. *Jensen*, 244 U.S. 205, 37 S. Ct. 527 (1917) and *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 90 S. Ct. 347 (1969).

Thus, in amending the LHWCA Congress provided that in addition to benefits being payable to "employees" for injuries occurring directly upon the navigable waters, compensation shall also be paid to "employees" for injuries occurring shoreside on

> "(* * * * any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)."

By amending the statute by the above quoted statutory parenthetical insert, Congress moved the jurisdictional compensation line shoreward *only* to areas adjoining the "navigable waters" which are customarily used for *ves-*

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[3] 33 USC § 902(3).

[4] 33 USC § 902(4).

sel loading and unloading, or for *vessel* repairing or building. Congress did not extend the jurisdictional line to areas customarily used for the loading or unloading of motor vehicles or rail cars.

Prior to the 1972 amendments an "employee" was defined as anyone employed by an employer but not a member of the vessel's crew, its master, nor any person engaged by the master to unload or load a vessel under eighteen tons net. Obviously, if the Congress had intended to extend the LHWCA benefits shoreward of the *Jensen* line to each and every "employee" of an "employer" Congress would not have amended the definition of "employee" as it then stood in section 902(3) of the LHWCA. But Congress did modify the definition of "employee" by adding the following limiting language:

> "[means] any person engaged in maritime employment, including any longshoreman, or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship breaker,"

There must be a nexus, some direct relationship, between the work being performed at the time of the injury and traditional maritime activity involving navigation and commerce on navigable waters. *Pennsylvania Railroad Company* v. *O'Rourke*, 344 US 334, 73 S. Ct. 302 (1953), *Nogueira* v. *New York, N.H. & H.R. Co.*, 281 US 128, 50 S. Ct. 303 (1930). Clearly, like the log pond worker in *Gilmore*,[5] truck loading, rail car loading, container stuffing, stripping, or repairing, etc. are not so directly related.

All that Congress did by the 1972 amendments was to extend LHWCA coverage across the water's edge to those

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[5] *Weyerhauser Co.* v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975), cert. den. 45 USLW 3241 (U.S. Oct. 4, 1976).

"employees" who "would *otherwise* be covered by the Act for part of their daily activity" [6] on the navigable waters. It was not intended that LHWCA benefits be extended to terminal and warehouse workers, none of whose daily activity is upon the navigable waters. It is the position of the NAS that the scope of "longshoring operations" which are included in the term "maritime employment" begins and ends with the activity of loading and unloading vessels. Furthermore, it is the position of the NAS that the loading and unloading activity is clearly defined in industry practice and elsewhere as the activity of a longshore gang moving cargo in a continuous operation between the vessel and the "point of rest" on the pier. This position has been adopted by the Fourth Circuit Court of Appeals [7] and concurred in by Judge Lumbard in the cases now before this Court [Pet. A. pg. 42a-44a].

The legislative history of the 1972 amendments pertaining to the extension of LHWCA coverage shoreward is meager. The main enlightenment provided by Congress is found in the Committee Reports referred to by the Court below [Pet. A. 30a-34a]. In those reports, the Committees had this to say:

> "It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be

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[6] S. Rept. 92-1125 at pg. 13 and H. Rept. 92-1441 at pg. 10-11. Emphasis added.

[7] *I.T.O. Corporation of Baltimore et al.* v. *Adkins et al.*, 529 F.2d (4th Cir. 1975), en banc decision of Aug. 26, 1976, pet for cert. pending as No. 76-730 *sub nom Adkins* v. *I.T.O. Corporation of Baltimore et al.*

noted that with the advent of modern cargo handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically *unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters.* The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. *The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.* Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of

cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." (Emphasis supplied.)

What Is the Point of Rest

The NAS submits that the "storage or holding area on the pier, wharf, or terminal adjoining navigable waters" referred to in the Committee Reports is nothing other than the cargo's "point of rest"—a term and functional line of demarcation known throughout the industry. As we shall demonstrate, it is the "point of rest" to which cargo, whether in breakbulk or containerized form, is immediately transported after being unloaded from a ship.

The term "point of rest" is one that has long been used in the industry to delimit the function of loading and unloading vessels. References to the point of rest concept appear in federal regulatory agency decisions at least as early as 1929, when it was explained in connection with a matter concerning handling charges assessed by steamship companies for on-pier handling of cargoes. In *Associated Jobbers and Manufacturers* v. *American Hawaiian S.S. Co.*, 1 USSBB 161 at 165, the agency then responsible for enforcing the Shipping Act, 1916 (46 USC § 801 *et seq.*), and whose functions are now vested in the Federal Maritime Commission, stated:[8]

[8] See also: same case 1 USSBB 198 at 200 (1931).

"In reply to questions bearing on the details of handling at the Atlantic coast docks of these two carriers, the witness states: 'Our practice is to establish on the dock at places convenient to the several hatches of the steamer *piles of cargo* for each discharge port of the steamer so that the steamer can as soon as practicable be loaded in an equitable manner and properly trimmed and the delivery at the ports expedited.'" (Emphasis added.)

The location of the "piles of cargo" soon became known as the "place of rest" or "point of rest", and in 1935 the United States Shipping Board Bureau again addressed itself to the proper assessment of charges for moving cargo on piers between the vessel and pile, or place of rest, and stated:[9]

"In unloading vessels, sling loads of cargo are lowered to trucks on the wharf at ship's side provided by the stevedore, who then removes the cargo to the sheds or other place of rest, where it is set up in piles. In a sling load of general cargo there are likely to be a number of different commodities for various consignees, and even for a number of different ultimate destinations, which necessitates a certain amount of sorting. Similarly, in loading a vessel the carriers frequently assemble in a single sling load cargo delivered to the wharf by several shippers."

and

"According to respondents [common carriers by water] the transportation rate does not contemplate delivery at point of rest on the wharf beyond ship's tackle, but in the case of San Francisco the carriers feel justified in not assessing a charge for the movement between ship's tackle and point of rest due to alleged lower costs to them at that port. No specific reason is given by respondents for the absorption at

[9] *Assembling and Distributing Charge*, 1 USSBB 381 at 383, 384 (1935).

Portland, Seattle, and Tacoma of the charge for handling cargo between ship's tackle and point of rest."

The employees involved in moving the cargo between the ship's tackle and place (or point) of rest were, and are, longshoremen. On October 12, 1934, following a labor dispute on the Pacific Coast, the presidentially appointed National Longshoremen's Board handed down a decision which defined *longshore work* and the occupations involved.[10] The arbitrators' award [11] interpreting the existing labor-management contract stated:

"*Section 1.* Longshore work is all handling of cargo in its transfer from vessel to first place of rest including sorting and piling of cargo on the dock, and the direct transfer of cargo from vessel to railroad car or barge and vice versa.

The following occupations are included in longshore work: longshoremen, gang bosses, hatch tenders, winch drivers, donkey drivers, boom men, burton men, sack-turners, side runners, front men, jitney drivers, and any other person doing longshore work as defined in this section."

In 1939 the United States Maritime Commission, which had succeeded to the functions of the United States Shipping Board Bureau, addressed itself to the "point of rest" concept [12] noting that the steamship lines serving

[10] Wytze Gorter and George H. Hildebrand. *The Pacific Coast Maritime Shipping Industry, 1930-1948*, Volume II: An Analysis of Performance (Berkeley and Los Angeles, 1954 University of California Press), p. 189.

[11] 25—National Labor Relations Board, San Francisco Administrative File—Box 485, National Archives.

[12] *Los Angeles By-Products* v. *Barber S.S. Lines, Inc. et al.* 2 USMC 106 at 113 (1939). See also: *Status of Carloaders and Unloaders*, 3 USMC 116 (1949); *Carloading at Southern California Ports*, 3 USMC 137 (1949); and *Los Angeles Traffic Managers' Conference, Inc.* v. *Southern California Unloading Traffic Bureau et al.*, 3 USMC 569 (1951).

the Port of San Diego collected a charge for handling the cargo between ship's tackle and *point of rest* on the dock at said port, and stated:

> "It is clearly established by the record in these cases that it is impracticable to spot such equipment at shipside and receive and deliver the cargo direct at ship's tackle. It is conceded that such practice would result in undue delay and inconvenience, increased risk of injury and damage, and increased cost to all concerned, including the ship operator, the terminal operator, and the shipper or consignee. It is customary, therefore, to receive and deliver general cargo at place of rest on the wharf or in the transit shed, where it is placed after unloading from or before loading to rail cars, trucks, or river vessels or barges. The rail cars are usually spotted on the low-line tracks which are on the land side of the wharf, or at the finer type piers, on the apron outside of the shed with the shed between the low-line tracks and the ship. At some of the terminals these low-line tracks are depressed below the level of the wharf floor to facilitate the loading and unloading of the cars and the handling of the cargo between car door and place of rest. The loading and unloading of the rail cars is performed by the stevedores, or by independent companies, at all terminals except those at Stockton and the East Bay ports of Oakland and Alameda where this service is performed by the terminal employees. A separate charge is assessed against the shipper or consignee for this service. In some instances cargo is handled direct between car door and ship's tackle and in such cases both the car loading or car unloading charge and the handling charge are assessed. Trucks are usually loaded and unloaded in the transit shed by the employees of the trucking companies."

In 1965 the Pacific Coast Longshore Collective Agreement defined longshore work as "all handling of cargo in its transfer from vessel to first place of rest, and vice

versa, including sorting and piling of cargo on the dock, and the direct transfer of cargo from vessel to railroad car or barge, or vice versa. . . ." [13] Thus, it is clear beyond doubt that "longshoring operations" at Pacific Coast ports only included cargo handling operations between the vessel and the place of rest on the pier or directly into a railroad car or barge located at the place of rest. Regulatory agency decisions for a long period of years indelibly stamped on the minds of both management and labor the term "point of rest" and the functional separations of labor and employer which occurred when cargo reaches that point. In addition, the National Labor Relations Board has found that the function of container stuffing and stripping is not a traditional longshore function on the Pacific Coast and may be accomplished by a variety of labor unions and employers.[14]

The term and concept of "point of rest" was as well known on the Atlantic and Gulf coasts as well as the Pacific, but the regulatory agencies had no occasion to become involved in disputes similar to those on the Pacific Coast, as the charge for moving cargo between the vessel and the point of rest on the dock was not separately collected from the shipper by the steamship line or marine operator.[15]

On the Atlantic Coast, moreover, prior to the 1950's and the modernization of pier facilities at various ports, truck loading and unloading, as well as rail car loading unloading, were primarily performed by independent

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[13] Betty V. H. Schneider and Abraham Siegel, *Industrial Relations in the Pacific Coast Longshore Industry* (1956, Institute of Industrial Relations, University of California, Berkeley), p. 1.

[14] *Pacific Maritime Association* v. *National Labor Relations Board* 515 F.2d 1018, (D.C. Cir.) cert. den. 424 U.S. 942.

[15] *Los Angeles Traffic Managers, Inc.* v. *Southern California Carloading Tariff Bureau et al.*, 3 FMB 569 at 578, 579 (1951).

trucking companies or by railroad employees at railroad owned marine terminal facilities.[16]

In the Port of New York the situation concerning truck loading at marine terminals became so fraught with crime and malpractice that the states of New York and New Jersey were compelled to create the Waterfront Commission Compact approved by Congress.[17] In a report to the Governor, Attorney General and legislature of the State of New York dated May 20, 1953, the New York State Crime Commission described in some detail the various operations and persons involved at New York/New Jersey piers as follows:[18]

"BASIC PIER OPERATIONS AND PERSONNEL

The basic operations of a pier include the docking or sailing of the vessel, the unloading or loading of the cargo between the hold of the vessel and the floor of the pier, the checking of cargo on the pier, the protection of the cargo on the pier and in the vessel, the loading and unloading of cargo between the floor of the pier and trucks, and the maintenance of the pier.

The supervisory work is performed by pier superintendents; hiring foremen, who hire the longshoremen; dock bosses, who hire the checkers; and roundsmen or head watchmen, who hire the protective force.

The loading and unloading of vessels is done by gangs of longshoremen, under the immediate supervision of gang or hatch bosses. General work around the pier is done by longshoremen called extra labor.

Checkers take inventory of cargo on arrival and departure. Timekeepers keep track of the work time. Watchmen guard the cargo, the piers, and the docked vessels.

Public loaders are independent of the rest of the pier operation. Their function is to load and unload trucks. They operate variously as corporations, partnerships, or individuals."

The Crime Commission also described in some detail the truck loading operations in the Port as follows:[19]

"V. THE PUBLIC LOADING RACKET IS A SERIOUS DRAIN ON THE PORT

'Public loading' has come to mean the moving or lifting of cargo from a pier and stacking it in the truck and also the reverse operation.

Years ago truckdrivers loaded and unloaded their own trucks at the piers. Occasionally individual loiterers were hired to assist. Gradually, groups of men came to establish themselves at particular piers, and to insist upon being hired to load the trucks, regardless of whether the truckdriver desired their services.

The steamship and railroad companies have always declined to assume the responsibility for loading and unloading trucks at their piers. On the other hand, the trucking companies, through their trade associations, have maintained that the steamship and railroad companies should assume this responsibility.

This impasse has resulted in default to the groups of public loaders that have come to infest the piers, and who claim prescriptive rights to be paid for the

[16] *Free Time and Demurrage Charges at New York*, 3 USMC 89 (1948); *Pennsylvania Motor Truck Association et al.* v. *Philadelphia Piers, Inc. et al.*, 3 FMB 789 at 791 (1952).

[17] Public Law 252, 83rd Congress (approved Aug. 12, 1953.)

[18] *New Jersey-New York Waterfront Commission Compact*, hearing before Subcommittee No. 3 on the Committee of the Judiciary, House of Representatives, 83rd Cong., 1st Sess. on H.R. 6286, 6321, 6343 and S.2383, July 22, 1953 Ser. #6 at p. 167.

[19] *Ibid.*, p. 187.

loading of trucks. With few exceptions, therefore, the loading at each pier or group of piers is controlled by a group of loaders whom truckmen must employ and pay to load trucks regardless of whether the loaders do any work, are needed, or are unwanted."

In an answer of the International Longshoremen's Association to the allegations and charges of the Crime Commission dated June 25, 1953 the union also submitted its description of waterfront and truck loading operations in the Port:[20]

"1. THE SERVICES PERFORMED BY PUBLIC LOADERS ARE VITAL AND NECESSARY TO THE FLOW OF COMMERCE THROUGH THE PORT

A great deal has been said and written on the subject of public loading. Much of it reveals complete ignorance of the subject. To clarify the facts, we should like to set forth briefly what public loading is.

A public loader is a man, one of a group of men, who are found on the piers and who load freight from the pier to the trucks, which cart it away. He is one of the human links on the chain that brings waterborne cargo into the cities of the port of New York. There are three principal links in this chain. First is the longshoreman who unloads the freight from the ships and places it on the pier. Second is the man who loads the freight from the pier onto the truck that will take it to its destination. Third, of course, is the truck. Unloading from the boat and loading from the piers are both longshore operations which are performed by members of the ILA, except in those rare instances where this work of loading is traditionally done by members of other unions.

[20] *Ibid.*, p. 230 and 231.

Clearly, then, loading is a necessary service, which must be paid for. There is work to be done, hard work, and somebody has to do it. The public loaders, members of the ILA are that somebody.

As the name indicates the public loaders do not work for any single, particular employer, but for the public; in this case, the truckers. They do not receive a wage or a salary. They are paid by the truckers whose trucks they load, on the basis of stipulated rates fixed by collective bargaining.

The public loaders work as groups. They divide the available work among themselves, usually on an equal basis. However, on occasion, cargo receipts on a given pier may be so heavy that the group of public loaders which work on that pier is unable to move the cargo from the pier to the trucks as speedily as the truckmen would like. When that happens the group hires longshoremen to assist in the work. Sometimes when one of the public loaders drops out of the group for some reason, a longshoreman who has had some experience as an extra worker with these groups, moves in and becomes a regular member of the group.

* * * *

We do not think the commission itself disputes the fact that the services rendered by the loaders are necessary ones. These men came into existence to fill a void. Steamship and stevedoring companies in the past, as at present, were unwilling to assume the task of loading cargo from piers to trucks. Truckmen on the other hand had neither the equipment nor the labor supply to perform this work. Consequently, men were hired on a piecework basis to do the job and these were the men who eventually became attached to the pier in the capacity of public loaders."

With the approval by Congress of the New Jersey-New York Waterfront Commission Compact (Public Law

252—83rd Cong., approved August 12, 1953), the public loaders and unloaders of trucks in New York were outlawed and truckers and terminal operators negotiated implementation of the Compact. As a result, the New York Terminal Conference was formed with the approval of the Federal Maritime Board which had now assumed the functions of the United States Maritime Commission, and rates to be charged to shippers for the service of loading and unloading trucks were established. It was agreed that truck loading and unloading would be accomplished by marine terminal operators in the Port but the trucker would have the right to load and unload its own trucks. In actual practice thereafter the terminal operator loaded most of the trucks which called at the port's piers while the truckers performed a substantial portion of truck unloading.[21] To this day truckers in the Port still may and do unload their own trucks.

While the marine terminal operator was obliged to employ members of the longshoremen's union when they loaded or unloaded trucks in the Port, that function did not become a maritime function and, in fact, never was a maritime employment or longshoring operation. As it did concerning the Pacific Coast container stuffing and stripping dispute, the National Labor Relations Board could not find that such functions were traditional longshoring operations but that the traditional work of the longshoreman was to load and unload ships.[22]

In all major ports of this country the movement of goods or merchandise, be it in breakbulk form or con-

[21] *Empire State Highway Transportation Association* v. *American Export Line et al.*, 5 FMB 565 (1959).

[22] *New York Shipping Association, Inc.* v. *National Labor Relations Board et al.*, 537 F.2d 706 (2nd Cir. 1976), petitions for cert. filed under the same name, #76-569 and #76-570, cert. denied Jan. 10, 1977.

tainerized,[23] enters in or leaves the port in two distinct steps. For import cargo the first is the unloading or discharge of the cargo from the vessel to the pier. This work is performed by independent stevedore contractors or steamship companies who employ workers called longshoremen to perform this function. In most ports on the Great Lakes, the Atlantic Coast and the Gulf Coast these workers have been organized by the International Longshoremen's Association. In some ports on the Great Lakes workers who perform longshore operations are members of other unions such as the United Steelworkers of America and the Brotherhood of Teamsters. On the Pacific Coast most longshoremen are members of the International Longshoremen's and Warehousemen's Union. The cargo is then immediately moved away from the vessel to the point of rest, place of rest, pile or marshalling area on or in the terminal. One of the reasons for the immediate movement of the cargo to the point of rest is to clear the area immediately adjacent the vessel so that vessel unloading operations may continue. This movement of the cargo is also performed by the independent stevedore contractor or the steamship company employing workers who perform longshoring operations. In all cases the workers who perform the actual vessel unloading and transfer of cargo to the point of rest are members of the same crew of workers referred to as the ship's gang, longshore gang, or deep sea gang.

The second step is the removal of the cargo away from the point of rest and off the pier.

[23] In modern day maritime parlance breakbulk cargo means individual pieces or packages of cargo which are loaded separately; and containerized cargo means individual packages or pieces of cargo which are placed into a shipping van or container having standard dimenstions of 8′ x 8′ x 20′, 8′ x 8′ x 35′, or 8′ x 8′ x 40′. The cargo vans or containers are capable of being transported by ship or mounted on wheels (chassis) and either driven by truck or carried by rail car.

In the case of export cargo, it is placed at the point of rest prior to loading onto the vessel and the process is reversed.

Import cargo at the point of rest, whether undercover in a terminal transit shed or warehouse, or in an open marshalling or storage area, remains there until called for by the consignee. Customary practice is to allow the consignee a period of time called "free time" during which the cargo may remain at the pier without additional charge. At the expiration of allowable free time, terminal storage fees are assessed against the cargo in accordance with terminal tariffs filed with the Federal Maritime Commission.[24]

Any further handling of the cargo is performed by the marine terminal operator, who is not a party to the maritime contract of carriage. In many ports the marine terminal operator may also be an independent stevedore contractor and provide services to the vessel and receive payment therefor from the vessel operator. In many cases, the employees of the stevedore contractor and the terminal operator may be members of the same union. In some instances, although members of the same union, the terminal or warehouse worker may be the member of a separate local unit of the union and is paid a different wage rate than the members of the ship's gang. In the port of Norfolk, Virginia, for example, the man who works in the warehouse is called a "shortshoreman." In some ports the warehouse worker may be a member of an entirely different union than the worker who loads the vessel.

In still other ports the warehouse or terminal operations are performed by public entities such as state port

[24] *North American Smelting Co.* v. *Moller S.S. Co.*, 204 F.2d 384, 386 (2 Cir. 1953), *National Packaging Corporation* v. *Nippon Yusen Kaisha*, 354 F. Supp. 986, 987 (N.D., Cal. 1972), and *Kinderman* v. *Nippon Yusen Kaisha*, 322 F. Supp. 939 (ED, Pa. 1971).

authorities or municipal governments[25] whose workers are by law excluded from the coverage of the LHWCA.[26] Injuries to those employees are compensated pursuant to the provisions of applicable state workmen's compensation laws. The charges for services performed by such employees, as is in the case of a private terminal operator, are assessed in accordance with terminal tariffs filed with the Federal Maritime Commission as prescribed by its rules and regulations. Those rules and regulations appear at 46 CFR Part 533 and were initially proposed by the Commission's predecessor, the Federal Maritime Board, in 1959.

In 1962 the Commission promulgated uniform definitions to be observed by marine terminal operators (27 FR 12777) and following a court challenge[27] were made effective July 14, 1967. Those regulations define the terms "free time," "terminal storage," "wharf demurrage," and "handling at point of rest." The last two specifically refer to the point of rest and indicate that it is the place on the terminal facility to which the Committees refer in their reports, *supra*. Those definitions are:[28]

> "(c) For the purpose of this section, 'point of rest' shall be defined as that area on the terminal facility which is assigned for the receipt of inbound

[25] For example, port facilities operated by Davisville, Rhode Island; South Jersey Port Corporation at Camden; North Carolina State Ports Authority at Wilmington and Morehead City; South Carolina State Port Authority at Charleston; Jacksonville, Florida Port Authority; City of Pensacola, Florida; and Alabama State Docks at Mobile.

[26] 33 USC § 903(a)(2); *Bagrowski* v. *American Export Lines et al.*, 305 F. Supp. 432 (USDC, ED Wis. 1969) reversed on other grounds 440 F.2d 502 (7th Cir. 1970).

[27] *Alabama Great Southern Railroad Co. et al.* v. *Federal Maritime Commission*, 379 F.2d 100 (D.C. Cir. 1967).

[28] 46 CFR 533.6(c); 46 CFR 533.6(d)(5) and (6).

cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading."

"(d) (5) Terminal storage: The service of providing warehouse or other terminal facilities for the storing of inbound or outbound cargo after the expiration of free time, including wharf storage, shipside storage, closed or covered storage, open or ground storage, bonded storage and refrigerated storage, after storage arrangements have been made.

(d) (6) Handling: The service of physically moving cargo between point of rest and any place on the terminal facility, other than the end of ship's tackle."

Thus, the Federal Maritime Commission and its predecessor agencies have always recognized the concept of point of rest and the separation of longshoring and terminal operations. In *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 FMC 505, 511 (1966) the Commission observed:

> "The Examiner would define stevedoring, in the case of import cargo, as one process of breaking cargo out of stow in the ship's hold, lifting the cargo from the vessel and depositing it on the pier's stringpiece and then carting it by hilos to the place of rest designated by the stevedore. In the case of export cargo the process is reversed beginning at the place of rest and ending in the vessel's hold . . . We think the Examiner's conclusion here is correct."

The point of rest is completely consistent with the Secretary of Labor's understanding of the term "longshoring operations" in 1972 in that Occupational Safety and Health Administration regulations in effect at the time [29] defined that term to mean:

[29] 29 CFR 1918.3(1).

> "the loading, unloading, moving or handling of cargo, ship's stores, gear, etc. into, in or out of any vessel on the navigable waters of the United States."

The concept of point of rest has such universal significance as to be recognized by academicians who conducted a socio/economic inquiry into the maritime industry as relating to Negro employment.[30] In the book which resulted from their research appears the following quotation which discussed how container and breakbulk cargo is handled in ports of the United States:[31]

> "Generally, cargo arrives on the pier by truck or by railroad car several days prior to its scheduled loading aboard ship. When the cargo is delivered to the terminal, it is separated, grouped, and stored in the marine terminal adjacent to the dock loading area. Once placed in temporary storage, the cargo is said to be in its 'last place of rest.' Up to this point, the work is generally performed by truck drivers, helpers, and warehousemen, although in some ports it is feasible for longshoremen to perform these functions.
>
> Typically, longshore work begins with the movement of cargo from this 'last place of rest,' combining the efforts of three separate units of dock, deck, and hold gangs, which comprise the larger longshore gang. In the storage area ashore, dock workers place the cargo on pallets in preparation for loading. Tractors or forklift operators move these pallets from the warehouse to dock side and place them within reach of the ship's cargo handling gear. . . ."

As recently as December 15, 1976, the Assistant Secretary of Labor for Employment Standards forwarded

[30] Lester Rubin, William S. Swift and Herbert R. Northrup, *Negro Employment in the Maritime Industries*, Volume VII-Studies of Negro Employment (1974, Industrial Research Unit, The Wharton School, University of Pennsylvania). Part Two.

[31] *Ibid.*, Part Two, Chapter II, p. 10.

a report to the Secretary of Labor on the "Longshore and Harbor Workers' Compensation Program" prepared by the Office of Workers' Compensation Programs (OWCP Task Force) concerning the myriad of matters and problems surrounding the Department of Labor's administration of the LHWCA. In Appendix B-1 of the report (p. 103-107) the Department of Labor describes with a fair degree of accuracy the "nature and character of the longshore industry" which includes recognition of the point of rest concept and the division of functions and employment which it delineates. The report also acknowledges the fact that in most ports stevedore contractors and marine terminal operators are separate and unrelated jobs. The report goes on to acknowledge that stevedore operations are confined to the area between the ship and the terminal area called the "point of rest." [32]

Finally, the term point of rest and the concept it represents have also been recognized in cases decided in the courts. Most noteworthy is a Court accepted stipulation between labor and management in the case *International Longshoremen's Association, AFL-CIO* v. *North Carolina State Ports Authority*, 332 F.Supp. 95 (E.D. N.C. 1971). In that litigation involving union organization among state employees, counsel for the parties entered into two very significant stipulations. In effect, those stipulations showed a clear agreement as to the meaning of "point of rest." The precise language of those important stipulations are set forth below:

> "7. All in-bound freight which is shipborne is unloading by stevedore company employees (longshoremen) onto the dock and is placed in transit sheds, apron or adjacent ramp, called a 'point of rest.' At no point do State Port Authority employees load

[32] The full text of Appendix B-1 is annexed hereto as Appendix A. See also, Philip Ross, *Waterfront Labor Response To Technological Change, A Tale of Two Unions*. Labor Law Journal (1976) pp. 397, 398.

> or unload directly from a ship. Once commodities or frieght is unloaded by the stevedore company employees, it is placed by them in transit sheds, open areas or adjacent ramps. From this point on, it may be taken to a warehouse or other storage location by employees and equipment of the Authority or it may be loaded from the transit sheds, open dock areas or adjacent ramps into truck or rail cars for outbound shipment.
>
> 8. As to incoming freight unloading from railroad or truck, this is done by Ports Authority employees. Such freight may first go to warehouses and subsequently be moved by Authority employees to transit sheds, or open storage areas, or it may be moved directly to transit sheds or dock areas where it is then placed aboard ship by stevedore company employees for outbound shipment." (Ibid. at 97)

The above case was reviewed and affirmed by the Fourth Circuit Court of Appeals at 463 F.2d 1 (1972), cert. den. 409 US 982 (1972).

The Lash Operation

In the LASH operations referred to in the Committee Reports, *supra* the point of rest and its attendant delineation of job functions and employers is of equal application as in the case of breakbulk operations previously described. The term LASH is an acronym for Lighter Aboard Ship, which simply means that cargo is placed in special uniform size "lighters," or barges, which are called LASH barges to differentiate them from river barges. The LASH barges are towed from the loading port to the location of the LASH vessel, which is sometimes called the mother ship. The barges are mechanically loaded by a crane on the mother ship and are stacked in specially constructed holds in the mother ship. The actual stowage or unstowage of the barges with their contents in the mother ship requires substantially fewer

longshoremen than does the loading of cargo into a breakbulk type ship. A very similar type of operation called SEABEE differs from the LASH operation described only in the size of the barge and the mechanical means for loading or unloading the barge onto or from the mother SEABEE ship.

The actual loading of the barges is performed by longshoremen in precisely the same manner traditionally employed in the loading or unloading of a breakbulk ship. However, in most instances the size of the longshore gang involved in LASH and SEABEE operations is smaller than the regular ship's gang primarily because of the smaller size of the barge. The barges are in fact vessels and ply the navigable waters of the United States and may be loaded or unloaded at any inland or coastal waterfront facility. For example, a LASH barge may be loaded in Chicago at any suitable facility and towed to New Orleans to be loaded onto the mother vessel. Conversely, the mother ship may discharge a loaded barge in New Orleans and then the barge may be towed to St. Louis (or any other river port) and unloaded there at any suitable facility.

Workers who actually load or unload the barges are engaged in traditional longshore operations and if injured while so engaged would obviously be entitled to the benefits of the LHWCA unless their employer were a state, municipal or other public political entity. Workers on the shore who perform truck loading, unloading or other traditional operations shoreward of the point of rest would not be longshoremen nor engaged in maritime employment and would be entitled to only state workers' compensation benefits under state law.

Containerized Cargo

As has been demonstrated, the advent of the LASH vessel may have reduced the number of longshoremen

loading vessels at coastal seaports. The capability of the LASH barges to travel the inland waters freely and to be loaded or unloaded at virtually any waterfront faciilty has resulted in increased utilization of labor both on the land and on the navigable waters.

As to containerized cargo one author has noted:[33]

> "The container revolution—that is, the transportation of water-borne commerce in preloaded containers suitable for overland transportation—began in the late 1950's on the major domestic trade routes (West Coast to Hawaii, Northwest to Alaska, and East Coast to Puerto Rico). After some delay, containerization was introduced into foreign trade, first by U.S. firms and more recently by foreign shipping companies."
>
> "Although it is a major innovation in shipping, containerization is a fairly simple concept based on a systems approach to cargo handling. Unlike conventional break-bulk cargoes that must be handled as individual items, container cargoes move from point of origin to final destination as a single unit, utilizing large boxes which are typically 8 feet square at the end and 20 to 40 feet long."

In a typical container operation involving import cargo the containers are lifted from the ship by a specially constructed shore-based container crane and landed on the terminal property alongside the ship either directly to the ground or onto a set of wheels. The container is then immediately moved to the container storage or marshalling yard. If the container has been mounted on wheels it is connected to a motor vehicle sometimes referred to as a "hustler." If the container has not been mounted on wheels it is picked up by a specialized piece

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[33] William Burke, *On the Waterfront*, Federal Reserve Bank of San Francisco, Monthly Review Reprint/October 1972, p. 17, 18, and 22.

of equipment sometimes referred to as a "hi-lo" (straddle carrier or forklift). When the container has been placed in the marshalling yard the vehicle operator returns to shipside to transport another container to the marshalling yard or point of rest. The workers who transport the container between the vessel and the point of rest or marshalling yard are longshoremen employed as a part of the ship's gang. In the case of export cargo the procedure is reversed.

At the point of rest or marshalling yard the container remains until it is called for by the consignee or until it is to be moved for transportation to inland destinations. If the container is to be moved inland away from the port area, the only additional handling of the container and its contents at the terminal is (a) to connect it to over-the-road motor units, or (b) to place it on a railcar, or (c) to place it upon a chassis or other wheeled device supplied by the inland carrier.

Once the containers have reached their inland destination their contents are removed ("stripped") by labor employed by the consignee or a freight consolidator. In the case of containers for export commerce the process is reversed and the fully loaded ("stuffed") container is placed at the marshalling area or point of rest to await loading onto the vessel. Obviously, the same procedure may be followed for containers whose contents are destined to or originate in the port area.

Alternatively the container may be stuffed or stripped on marine terminal property in the same manner as at inland facilities. In those instances the containers are stuffed or stripped in a warehouse structure, sometimes referred to as a "transit shed" or "stuffing and stripping shed." The workers in these instances are warehousemen or terminal workers employed by the terminal operator. They are not a part of the ship's gang and their employment does not involve any work on a vessel or

in any activity occurring between the point of rest and the vessel. In many ports those who work in the terminal warehouse are members of the same union as those who work in the ship's gang (longshoremen). Regardless of where container stuffing and stripping is performed and regardless of the employer involved, the function, purpose and degree of the risk are the same. Thus, the employee of a manufacturing company who stuffs or strips a container at an inland facility miles away from the navigable waters is performing the identical work and is subjected to the identical risk as one working in a marine terminal. The fact that one may call himself a longshoreman or happens to be the member of a longshore union does not change the nature of the work nor render it maritime.[34]

The Economic Impact of the 1972 Amendments

The impact of the 1972 amendments to the LHWCA upon the stevedoring and marine terminal industry as well as other affected industries was swift, certain and extremely costly. As one could anticipate, the cost of securing insurance to cover the employer's liabilities under the amended Act immediately soared. Section 32 of the Act[35] requires that persons engaged in stevedoring must secure adequate insurance coverage or self-insure themselves with the approval of the Secretary of Labor. The failure to do so means that stevedoring services may not be lawfully rendered.[36] Generally, insurance premium charges assessed by commercial carriers are stated

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[34] A detailed description of stevedoring and terminal operations at most ports of the United States which was before the Fourth Circuit Court of Appeals in *I.T.O. Corporation of Baltimore* v. *Adkins et al., supra,* may be found in the Appendix to the NAS memorandum in response to the Petition for a writ of certiorari in *Adkins* v. *I.T.O. Corporation of Baltimore* (No. 76-730).

[35] 33 USC § 932(a).

[36] 33 USC § 937.

as a percentage of payroll. Prior to the 1972 amendments the nationwide manual premium for the underwriting category of general stevedoring was approximately $17 per $100 of payroll, or 17% of payroll. By September 1975 the nationwide average had risen to $28 (or 28% of payroll) with individual state ratings ranging from 13.46% to 41.85%. At that time in fourteen states the rating exceeded 30% of payroll while in eight others the rate was in excess of 20%. For the underwriting category of container stevedoring the pre-1972 average rating was 9.3% and by 1975 had risen to 15.8%.[37]

At the same time the number of claims reported to the Department of Labor soared from 72,087 in 1972 to 151,274 by the end of 1974. The number of lost time injuries reported increased in the same period from 17,667 to 32,944. An analysis of this phenomenon by the Comptroller General of the United States in 1976 [38] which studied injuries reported from February 1973 through June 1974 showed that of the 186,336 reported during that period some 86,325 (or 46%) occurred in areas to which the Department of Labor felt that coverage had been extended by the 1972 amendments.

In the recent OWCP Task Force Report, *supra* it is indicated that the Department of Labor's cost of administering the LHWCA had risen from a figure of $1,394,-

[37] *The Journal of Commerce* (New York), Monday, September 22, 1975. "Stevedores Seek Court Ruling to Clear Compensation Muddle" Thomas D. Wilcox. The actual premium paid by individual companies may be greater or less than manual depending upon individual companies' experience and underwriting rating.

[38] *Improvements Needed In Administration Of Benefits Program For Injured Workers Under The Longshoremen's And Harbor Workers' Compensation Act*, Report to the Senate Committee on Labor and Public Welfare by the Comptroller General of the United States, Jan. 12, 1976.

000 in 1973 to $2,553,885 in 1976.[39] That report also indicates that from 1972 to 1976 maximum compensation rate for longshoremen covered by the Act increased by 358% and that compensation and medical benefits paid from calendar year 1972 through 1975 increased from $33 million to $88 million and that there was a 149% increase in the number of cases compensated.[40]

The combination of skyrocketing levels of compensation payment, the number of claims for which payment was sought, the uncertainty of the scope of federal jurisdiction, and other market forces vastly restricted the availability of insurance. For example, it has been reported that in the Seattle area only two companies were writing LHWCA insurance in 1976 compared with twenty-five companies that had been writing it in the past.[41] One employer in the Seattle area was quoted in that article as saying:

> "But since we are small our broker * * * can't get anyone to take it. And I can't run my business without it because the government says we must have it.
>
> But if I can't get a renewal I'm out of business on the waterfront. Our employees will be hardship cases. When employed they make a decent wage."

The article goes on to state that the employer felt it would lose business because the shipowner would go to California where the state provided insurance that covered longshore and harbor workers.

In other instances several insurance companies have terminated insurance coverage of employers thus requir-

[39] OWCP Task Force Report, *supra*, p. 81.

[40] *Ibid.*, p. 45.

[41] *Dock Workers Comp Costs Seen As Critical Problem*, "Business Insurance," ((Crain Communications, Inc., week of November 10, 1976).

ing that the employer either become self-insured if it has the financial resources, seek insurance from an assigned risk pool at a high rate, or go out of business. In a "Special Report of the Waterfront Commission of New York Harbor Concerning Fraudulent Workmen's Compensation Claims in the Port of New York-New Jersey" of December, 1976 the Waterfront Commission reported to the Governors of the States of New York and New Jersey that (p. 27):

> "The cost of Workmen's Compensation in Brooklyn has reached such astronomical proportions that a major stevedoring company was compelled to stop doing business in Brooklyn and to move its entire operation to New Jersey."

The report also states at p. 26 that in the Port of New York a new waterfront employer must typically pay insurance premiums as per the manual of 31.3% of payroll. However, the report also indicates on the same page that the average premium actually paid with experience ratings included is in the area of 40-45% [42] of payroll.

The recent report of the OWCP Task Force, *supra* has recognized this problem and its comments are what appear in Appendix B of this brief.

While the stevedore employers struggle for economic survival and the securing of insurance for their operations between the vessel and the point of rest, the private marine terminal operator now faces an additional competitive challenge from its publicly operated competitor as the LHWCA crosses over the point of rest and into the marine terminal. One of the stated intents of the Congress was to permit a uniform compensation system to apply to employees who would otherwise be covered

[42] See also: *Administration of the Federal Employees' Compensation Act*, Thirty-Ninth Report by the Committee on Government Operations, Union Calendar No. 877, House Report No. 94-1757, 94th Congress, 2d Sess., at pg. 9.

by the Act for part of their activity. The Committees did not intend to cover employees not engaged in loading or unloading vessels just because they are injured in an area adjoining navigable waters used for such activity.[43] If coverage of the LHWCA is extended beyond the point of rest and into terminal or warehouse operations, employees, none of whose activities would otherwise be covered by the Act, would become entitled to LHWCA benefits *only* if they were employed by private companies. If employed by state port authorities or municipal entities they would not be entitled to LHWCA benefits and the intended uniformity of the compensation system is destroyed.

The economic injustice caused by the uneven application of the LHWCA can be readily demonstrated by considering events which transpired in the State of Texas shortly after the U.S. Court of Appeals for the Fifth Circuit handed down a decision in which two judges found that LHWCA coverage extended to warehouse or terminal workers.[44] On October 20, 1976 the insurance carrier providing the bulk of LHWCA insurance in the State of Texas and other Gulf ports notified its policyholders that because of the recent decision of the Court it would be necessary to increase the premium charges for warehouse employees, freight handlers and other shoreside personnel. Policyholders were also advised that the coverage and increased premiums would be applied to include movement of cargo within the warehouse as well as into and out of the warehouse even when no ships are in port. Shortly thereafter, at the request of the insurance carrier, the Texas Insurance Commission approved a rate increase from 13.37% of payroll to

[43] Senate Report 92-1125, 92nd Cong., 2nd Sess., p. 13; House Report 92-1441, 92nd Cong., 2nd Sess., p. 11.

[44] *Perdue* v. *Jacksonville Shipyards, Inc.*, 539 F.2d 533, petitions for cert. pending.

25.31% of payroll effective January 1, 1977. In December of 1976 the Port of Beaumont, Texas sent a notice "To Our Valued Customers" who were subscribers to the Port of Beaumont's terminal tariff on file with the Federal Maritime Commission.[45] That notice stated:

> "Effective January 1, 1977, Workmen's Compensation Insurance covering International Longshore Warehousemen at the Texas Gulf Ports will be increased by 15.32%. This will increase the pay scale for Warehousemen by $2.00 per hour. Port of Beaumont regrets that this increase in Workmen's Compensation necessitates an increase of approximately 7.08% in Port's Handling Charges."

On December 27, 1976 the Port of Beaumont filed with the Federal Maritime Commission a general rate increase to be assessed against the public for the handling of cargo at privately operated terminal warehouses. Since the increase in insurance costs approved by the Texas Insurance Commission and followed by other Gulf states does not apply to publicly operated terminals or warehouses, the immediate disadvantage to the private operator clearly not intended by the Congress is easily discernible.

CONCLUSION

As was succinctly stated by counsel for petitioners Northeast Marine Terminal Company, Inc. and State Insurance Fund, citing decisions of this Court—"In law, as in life, lines have to be drawn" [46] "and the constant business of the law is to draw such lines." [47] In 1972 Congress drew two lines. In amending the definition of "employee" in section 2(3) of the LHWCA it drew a line between all "employees" and employees "engaged in

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[45] Port of Beaumont Terminal Tariff #T-4-H.

[46] *Pearce* v. *Commissioner*, 315 U.S. 543, 558 (1942).

[47] *Dominion Hotel* v. *Arizona*, 249 U.S. 265, 269 (1919).

maritime employment, including any longshoreman or other person engaged in longshoring operations." Congress also moved the line separating federal from state jurisdiction shoreward from the water's edge to "any adjoining pier, wharf, dry dock, terminal * * * or other adjoining area customarily used by an employer in loading, unloading * * * a vessel."

The NAS believes that those lines should be drawn where vessel loading begins, and where vessel unloading ends, at the "point of rest" on the pier. Both longshoring operations and vessel loading and unloading are performed only between the "point of rest" and on the vessel at the water's edge. The two identical committee reports plainly indicate that Congress intended to limit the type of employment entitled to LHWCA benefits as well as to limit the shoreside area in which injuries were compensible by the federal statute. It is clear that rail car or truck loading functions are not employments to which the LHWCA applies and that Ralph Caputo was not to be entitled to LHWCA benefits for the injury he sustained any more than was the trucker he was assisting on the day of his injury.

It is equally clear that Carmelo Blundo was not engaged in an employment that Congress intended to be subject to the LHWCA when he slipped and fell on the ice. The location of his accident was not one customarily used by his employer to load or unload vessels, and the container or shipping van with which he was working had been unloaded from a ship by another group of men working for another employer at another location. Nothing in the committee reports even hints at the suggestion that Congress intended to extend the coverage of the LHWCA through the streets of New York several days after unloading of the vessel had been completed.

The NAS agrees with Judge Friendly's observation that "it is not enough that a claimant calls himself a longshoreman or that a longshoreman's union in a particular port has forced employers to hire its members for such unlongshoreman-like positions as clerks or guards." [48] Ralph Caputo was engaged in such an "unlongshoreman-like" employment in a truck, and Carmelo Blundo was similarly occupied in watching the stripping of a container, a function no more hazardous or maritime than the clerks or guards to which Judge Friendly refers.

Finally, the dissent of Judge Lumbard sums up most concisely the logic and necessity for drawing the jurisdictional line at the point of rest wherein he stated: [49]

> "I agree with Judge Winter that "[t]he 1972 extension of coverage was intended only to remove inequities and anomalies arising when a person otherwise engaged in 'maritime employment' was injured on land," 529 F.2d at 1081, and with his additional statement that ". . . with respect to longshoremen or other persons engaged in longshoring operations, the Amendments extend only to those employees engaged in loading and unloading activities between the ship and the first (last) point of rest, including checkers 'directly involved in [such] loading or unloading functions,'" 529 F.2d at 1088.
>
> It is more in keeping with the realities of maritime employement to draw the line at the first point of rest in discharging the cargo and at the last point of rest in loading a vessel. Moreover, such a rule is far easier to apply and avoids claims such as that put forward by Dellaventura that he is entitled to compensation for his injury while loading a consignee's truck with coffee bags which had been stored in a warehouse for 133 days after being removed from the ship CAMPECHE. This being so, it seems to me that the interpretation adopted by the Fourth Circuit is more consistent with what the Congress intended and with the language of the 1972 amendment."

[48] Pet. A. pg. 33a.

[49] Pet. A. pg. 43a.

For these reasons then, the NAS respectfully urges this Court to reverse the judgments below.

Respectfully submitted,

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APPENDICES

APPENDIX A

NATURE AND CHARACTER OF THE LONGSHORE INDUSTRY

Studying the longshore industry means looking at such factors as shipping fleets, ports, marine terminal operators, stevedores, the nature of various occupations, technological advances in ship design, cargo packaging and handling, management organizations, unions, and labor management relations.

The major merchant fleets of the world in 1975 numbered 22,591 ships, with 583 of these ships belonging to the United States (see Figure 1, Major Merchant Fleets of the World, and Figure 2, U.S. Oceangoing Merchant Marine). Consequently, the vast majority of the ships on which longshoremen work are foreign flag ships manned by foreign crews.

Port efficiency continues to be a major concern of the maritime industry. Piers must constantly be upgraded to provide more spa both horizontally and vertically, to prevent overcrowded docks that can cause a 15 to 20 percent drop in movement of goods. Specialized cargo handling equipment must constantly be maintained and upgraded to speed the loading and unloading process, the transportation systems leadings into and out of the port must be free of congestion, and proper security must be provided to reduce pilferage (see Figure 3, U.S. Ports, Figure 4, Principal U.S. Ports in Foreign and Domestic Commerce, and Figure 5, Volume of Cargo Handled by U.S. Ports in 1973).

The marine terminal operator, who may own or lease the terminal property, is responsible for the safe handling of the ship, the delivery and receipt of the ship's cargo, and all movement and handling of that cargo between the point-of-rest and any place on the marine terminal prop-

erty except to shipside. The terminal property includes heavy lift cranes, forklift trucks, straddle carriers, platform trailers, and other equipment. In most ports, stevedore contractors and marine terminal operators are separate and unrelated jobs.

A stevedore or stevedore contractor is responsible for loading or unloading a ship in port by contract with a shipowner, agent, or charter operator. In the past, the stevedore, as the employer of the longshoreman, was a labor broker with little financial investment beyond providing safety and primitive cargo handling equipment. Currently, the stevedore has a substantial financial investment in such cargo handling equipment as forklift trucks, newsprint roll handling equipment, trailers for the placement of cargo containers, bulldozers, payloaders, and other machinery.

Stevedore operations are confined to the area between the ship and the terminal area called the "point of rest." This is the area close to the ship being loaded or unloaded where cargo is placed before delivery or further handling by the owner or operator of the marine terminal.

Most stevedoring companies are small firms providing technical knowledge and supervision of cargo loading and unloading. Small ports typically have 1 or 2 stevedoring or terminal companies, while larger ports may have as many as 15 privately owned firms. Because ship arrivals are irregular, a stevedoring company may work several ships or none at all on any given day; consequently, the demand for labor varies widely from day to day.

Longshoremen work in a gang or crew distributed between the ship and the pier so they can move cargo in an uninterrupted flow. A longshoreman may be designated by the equipment he operates—i.e., winchman or

hustler operator, or by the area in which he works—i.e., holdman. An average gang consists of 1 foreman, 6 to 10 men working in the hold of the ship, 1 hatchtender, 2 winchmen, and 6 to 8 truckers. The longshore gang varies from 12 to 20 workers for break bulk (historically, the typical gang) to varying numbers for specialty work on bulk, containers, and unitized loads.

For example, the typical break bulk gang in the port of Philadelphia is composed of 20 men: 15 regular and 5 new men. Nine to 12 are holdmen. Three of the best and most experienced are deckmen: one winch operator, one hatch man giving the signals, and one relief person. Four gang members are dockmen: two doorway men, who hook and unhook loads, and two forklift operators. One gang member, hired by the stevedoring company, serves as the foreman and hires the other gang members.

Other longshoremen working on the dock, usually older or disabled workers, include the gearman, who operates a forklift to bring supplies to the gangs, and the waterboy, who provides water for the gangs. Longshoremen may also work as crane operators, drivers of vehicles going on and off ships, baggage handlers on pleasure ships, and as positioners and fasteners of hose lines to ship tanks for loading or unloading liquid cargo.

Good physical condition is the only entry level requirement for longshore work. Informal on-the-job training is provided for new men by the more experienced longshoremen, and the work is usually learned in a few weeks. The wage rate is excellent for longshore work (see Figure 6, Longshore Straight Time Hourly Wage Rate), but the industry is declining because of mechanization (see Figure 7, Longshore Manpower Normally Available). Safety continues to be a problem, but the accident rate is declining as handling is mechanized. In 1971 the accident rate was 69.9 injuries per million man-hours

worked. This was down from the 1960 rate of 131.8, but still five times higher than the national average.

As the industrial nations of the world began to recover after World War II, they started to upgrade their shipping fleets to gain a competitive edge and take advantage of the mechanization in cargo handling and packaging. The demand for larger and faster ships increased building and operational costs and dictated reducing port time in order to lower transportation costs. Shipping owners found that the time spent in port was 10 percent higher than the time spent at sea. A common shippers' axiom is that time at sea is money earned, while time at port is money lost.

The first cargo handling equipment ever used was the longshoreman's hook, a tool still used today for moving loose bales, boxes, and sacks. The rope sling is the oldest piece of hoisting equipment, and also is still used today. Before World War II, the continuous escalator belt had been developed, greatly accelerating the loading and unloading of loose sacks, bales, and boxes. At the same time, the mechanized pouring of grain into the ships' holds took the place of sacking the grain and manually placing it on the ship.

During the war, the development of the forklift was another major breakthrough in terms of equipment. Other machinery developed later included the whirley cranes, which handle 35-ton loads; clam shells, which consume 2 to 13 tons per bite; Gantry cranes, which lift containers weighing 20 to 40 tons; and the automatic revolving cylinder, which clamps a railroad car that can dump its 90-ton load in 45 seconds.

Cargo packaging began to change radically about 1955 to keep pace with the mechanization of cargo handling equipment. Break bulk cargo or loose cargo in sacks, bags, and boxes that had to be handled item by item

began to give way to the packaged or unitized load and the container. The packaged or unitized load is made up by the manufacturer and is strapped or glued together on a pallet and handled as a unit at dockside. The container, also handled as a unit at dockside, is a box measuring either 8 x 8 x 20 feet and holding 20 tons, or 8 x 8 x 40 feet and holding 40 tons.

With the advent and rapid growth of the container and container leasing companies (see Figure 8, U.S. Container Inventory Comparison 1975-1972, and Figure 9, U.S. Container Ownership—Carrier vs. Leased 1975-1972), the mechanization of cargo handling exploded. Originally the container ship was hailed as the ship of the future, but it quickly became apparent that many countries of the world could not afford the sophisticated port facilities necessary to load and unload a containerized ship.

To serve underdeveloped ports, it is now predicted that the ships of the future will be the roll-on/roll-off vessels that drop huge ramps onto the docks so that the ships' own equipment moves the containers and pallets on and off the ships. The cargo will be loaded onto a truck, train, or barge at dockside by the lighter aboard ship (LASH), which has cranes to swing over the water. Thus an entire barge can be loaded with contents weighing 80 to 100 tons and floated like a massive container to any convenient point.

When all cargo is shipped by bulk or container, only 20 percent of the current longshore work force will be needed. The ratio of tonnage to man-hours in the loading and unloading of a fully containerized cargo compared to a break bulk cargo varies from 13 to 1 to 18 to 1. A single longshoreman can now handle 13 to 18 times more cargo an hour if it is in a container. For bulk cargo such as sugar, wheat, and iron ore, the ratio is 8 to 1.

Management associations representing the shipowners, stevedores, and terminal owners are principally the New York Shipping Association, Inc. for the east coast, the New Orleans Steamship Association for the gulf coast, and the Pacific Maritime Association for the west coast (see Figure 10, Major Maritime Management Associations).

Unions representing the longshoremen are principally the International Longshoremen's Association (ILA), with 49,000 longshoremen led by Thomas W. Gleason for the east coast, Great Lakes and gulf coast, and the International Longshoremen's and Warehousemen's Union (ILWU), with 12,000 longshoremen led by Harry Bridges for the west coast (see Figure 11, Longshore Unions).

Both unions and management organizations in the United States underwent dramatic changes in the mid-1950's because of technological changes in the industry and economic growth and competition from other countries for the U.S. export business. As bulk and unitized loading became more important in the 1950's, the many small, privately owned steamship and stevedoring companies could not afford the capital outlay for the new equipment needed. These small firms were sold to or merged with conglomerates and multinational companies. Large industrial firms also began operating their own shipping companies, and with the new, larger stevedoring companies they became a more dominant voice in the management organizations.

In 1954, the ILA was expelled from the American Federation of Labor (AFL) after ILA President Joseph Ryan and local leaders resigned because of criminal investigations or indictments. At the same time, the AFL chartered the International Brotherhood of Longshoremen (IBL-AFL) to organize the longshoremen. The resulting battle between the ILA and the IBL left deep

scars in the ILA when it was readmitted to the AFL-CIO in 1959. The turbulent strikes and negotiations of the 1960's reflected the tensions between the unions.

The need for longshoremen is declining, and the union is now involved in protecting the earnings of its members as the phaseout continues. The upcoming ILA contract negotiations in September 1977 will deal with such matters as requiring that all containers and unitized cargo be assembled and broken down by longshoremen within a 50-mile radius of the port and minibridge, and preventing the current trend toward moving goods by rail from the east coast to the Pacific coast for shipment across the Pacific Ocean.

APPENDIX B

XIV. INSURANCE

Program Description

Employers covered by the Longshoremen's and Harbor Workers' Compensation Act or one of its extensions are required to obtain insurance fron an insurance company authorized by the OWCP, or may become authorized as self-insurers to pay benefits directly to injured employees. Applications for authorization to insure or to self-insure benefits under the appropriate Act are submitted to the national office of the OWCP.

The DLHWC Branch of Insurance handles all requests for information regarding authorization of an insurance company or employer, and sends complete details and application forms to all employers requesting information. When a properly prepared application with all necessary information is received, the Branch of Insurance tries, within 30 days, to inform the applicant on the application's probability of approval. If additional information is required before the application can be considered, the company is generally advised accordingly within 5 working days.

A printed application form is not required for insurance companies to request authorization. A written request signed by an officer of the company is sufficient. The application also requires information regarding the company's experience in writing workers' compensation insurance, and evidence that it has authority in its charter or form of organization to write workers' compensation. If the application is approved by the DLHWC, authorization forms are submitted to the OWCP Director for final approval and signature. An uncomplicated application should be processed between 30 and 60 days.

Applications to self-insure also are the responsibility of the Branch of Insurance, DLHWC, and frequently must be processed quickly because an employer's insurance policy is about to expire. Processing applications to self-insure usually requires from 60 to 90 days, but occasionally may be completed within 30 days. Should the requesting company have difficulty in meeting OWCP's requirements, an application may take 6 months to process, and in unusual situations a year may be necessary. Delays are not necessarily the fault of the DLHWC. Usually, they are due to the company's inability to provide the required information or obtain the required financial backing required by DLHWC to insure against defaulted payments.

In considering employers' applications the Branch of Insurance must examine applicants' financial positions conservatively. A company may be liable for many years for benefits resulting from injuries or deaths. Self-insured employers are required to secure their liability under the Act in amounts determined by the OWCP in the form of an indemnity bond or deposit of approved negotiable securities. Indemnity bonds are held by the DLHWC and negotiable securities are held by Federal Reserve Banks and released only on the approval of the Department of Labor.

Annual reviews are made of authorized insurance companies for renewal of their authorizations. Renewal of an authorization must be requested. Self-insured companies' authorizations may be renewed each year by filing a renewal indemnity bond or by maintaining the security deposit with a Federal Reserve bank. Approximately every 18 months, or as soon as possible if more than 18 months elapses, the Branch of Insurance requests self-insured employers to report all active disability or death cases and their estimated value of each case. The Insurance Branch transmits these reports to district of-

fices for verification of the estimates by the deputy commissioner, whose review should be completed within 60 days of referral. The national office makes the final determination of the reserve requirement.

Coverage of individual employers coming under the Act is monitored by the OWCP district offices. A certificate of compliance is furnished each active employer on receipt of a notice of coverage from the insurance carrier. The notice of coverage, card Form LS-570, when received by the district office, is then filed within 48 hours of receipt and the expired card removed. The insurance cards are reviewed every 60 days to prevent lapses of coverage. The district office is responsible for notifying an employer of the expiration of coverage if a new card report is not received.

The OWCP does not have authority under the Longshore Act to set or regulate rates charged for coverage or to direct insurance carriers to write coverage for individual employers under the Act. The OWCP cannot require carriers to form an assigned-risk pool to provide coverage under present law.

Findings

Due to the high benefit levels currently provided under the LHWCA, and uncertainty regarding future liabilities under the Act, a large and growing number of insurance carriers have withdrawn from writing coverage under the Longshore Act. Those who continue to write such coverage quote premium rates which many employers feel are excessive. The result is an increase in the number of applications for self-insurance from marginally profitable companies. The industry asserts, with supporting evidence, that the costs of obtaining longshore coverage—which have increased so dramatically since the enactment of the 1972 amendments—are becoming prohibitive for small firms. They are substantially affecting the economic position of larger firms, and are creating the gaps in the availability of coverage.

Longshore coverage is difficult to obtain in some areas of the country, particularly on the west coast. The market for coverage for small employers in the State of Washington is now virtually nonexistent. However, the Washington Legislature is expected to remedy this in January 1977, by passing legislation which will permit the Washington State Fund to provide coverage under the Act. In June 1976 the State of California passed such legislation, which temporarily has resolved the coverage availability problem there. The California law provides the State fund with authority to write longshore coverage for only 2 years. The California Legislature indicated that the problem of providing coverage under the Longshore Act is a Federal problem and therefore should be resolved at the Federal level on a permanent basis.

A possible solution to the present problem of high rates may be to permit small employers to self-insure as a group.

Undoubtedly, there are a large number of small employers who are uninsured under the Act. It may be necessary to establish some form of enforcement program. High rates and lack of coverage availability are contributing reasons for noncompliance with insurance requirements.

Proper maintenance of coverage cards at the district office level is a problem because of insufficient staff. Automation of this function may be desirable, and should be considered in developing an automatic data processing (ADP) system.

Recommendations

The Task Force recommends that:

1. OWCP undertake a comprehensive fact-finding study of the insurance problems obstructing the effective administration and implementation of the LHWC. The study should include an alaylsis of the mechanics of rate-setting, availability of coverage for employers, possible action which DOL can take within present legal limits, and possible alternatives to insure that the required insurance is available at a reasonable cost. The study should also assess the feasibility of group self-insurance to reduce present gaps in coverage.
2. OWCP study the feasibility of computerizing the insurance coverage system (now performed in the district offices) to make available a central index of all coverage, current and past. This study should be included as part of the ADP system for developing a management information system and automating special fund operations in the national office of the DLHWC.
3. OWCP monitor developments in proposed legislation in the State of Washington aimed at providing coverage for employers through the Washington State Fund. (The Fund is presently prohibited by law from providing Federal coverage.)

MOTION FILED

JAN 21 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-444

NORTHEAST MARINE TERMINAL COMPANY, INC. AND STATE INSURANCE FUND, *Petitioners,*

v.

RALPH CAPUTO

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, *Respondents.*

No. 76-454

INTERNATIONAL TERMINAL OPERATING CO., INC., *Petitioner,*

v.

CARMELO BLUNDO

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF WEST GULF MARITIME ASSOCIATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The West Gulf Maritime Association moves the Court to grant it leave to file the attached Brief Amicus Curiae in support of the Petitioners in the above cases, and as grounds therefor would respectfully show:

1.

Petitioners in both cases have given their consent to its filing as has the Solicitor General of the United States on behalf of the Federal Respondent, Director, Office of Workers' Compensation Programs, Department of Labor. Counsel for the individual respondents has declined his consent. The written consent letters have been filed with the Clerk of this Court.

2.

The *Caputo* and *Blundo* cases are the first cases to be considered by this Court on the question of post-1972 shoreside jurisdiction under the Longshoremen's Act and are therefore likely to have a dramatic, if not completely final, precedential effect. Over 90% of the general cargo longshore gangs employed in the Port of Houston work on breakbulk cargo (bales of cotton, bags of rice, boxes or cartons of cargo), and the apparent factual importance of containerization in the New York area may tend in *Caputo* and *Blundo* to obscure the importance of breakbulk cargo practices to the jurisdictional question on a nationwide basis.

3.

Additionally, it appears from conferring with counsel for petitioners in both *Caputo* and *Blundo* that they will not present the significance of certain of this Court's holdings concerning the meaning of the term "maritime employment" in the Longshoremen's Act prior to the 1972 Amendment. This Amicus believes strongly that this Court's pre-Amendment definition of "maritime employment" was adopted by the Congress in the 1972

Amendments and was explicitly affirmed in the legislative history of those Amendments. The attached brief is offered to bring these authorities to the attention of the Court.

4.

The West Gulf Maritime Association is composed of some 66 stevedoring companies, steamship owners, agents and operators, and terminal freight handling companies located geographically from Lake Charles, Louisiana to Brownsville, Texas. Much of the employment provided by these companies is in the area adjoining navigable waters in the ports of the West Gulf area, and the jurisdictional reach ashore of the Longshoremen's and Harbor Workers' Compensation Act as amended in 1972 is of crucial significance to these employers. Indeed, on January 1, 1977, compensation insurance rates on policies already issued covering wholly shoreside employees working in the areas adjoining navigable waters were increased by 138% based solely on the decision of the Court of Appeals for the Fifth Circuit in the *Ford* and *Bryant* cases, both of which arose out of the West Gulf area, reported *sub nom Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533 (5th Cir. 1976), pet. for cert. applied for, *P. C. Pfeiffer Co., et al v. Diverson Ford, et al,* No. 76-641. This increase was made because the Fifth Circuit extended coverage of the Longshoremen's Act to all employees engaged solely in warehouse freight handling on areas adjoining navigable waters. Next to direct waterfront labor costs, the cost of workmen's compensation insurance is the next largest item of cost for the Association's members. Cargo transfer operations within the area adjoining navigable waters are the actual business of many of the members of the West Gulf Maritime Association, and the Association is vitally

concerned with the extension of federal jurisdiction into this area.

5.

The principal reason assigned by counsel for the individual respondents for declining to consent to the filing of the Amicus Brief was his opinion that "all legal issues involved" would be briefed by the National Association of Stevedores to whom he had given his consent for filing a brief amicus curiae. His belief in this regard is erroneous as counsel for the National Association of Stevedores also has advised that he does not plan to deal with the significance of this Court's pre-Amendment statements concerning "maritime employment." Therefore, the legal arguments contained in the attached brief apparently will not be presented to this Court through any other means save in the attached brief.*

6.

The West Gulf Maritime Association desires to suggest a simple two-question test which, if adopted, it believes would quickly, easily and precisely resolve substantially all, if not all, of the jurisdictional questions relating to shoreside injuries under the 1972 Amendments to the Longshoremen's Act in full accord with Congressional intent.

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* Counsel for the individual respondents also reasoned that the National Association of Stevedores represented "over 40 stevedoring and shipping companies from all areas of the United States," including some members of the West Gulf Maritime Association. While it is true that 12 of the 66 members of the West Gulf Maritime Association are also members of the National Association of Stevedores, there still remain 54 additional members of the West Gulf Maritime Association who have at least an equal, if not greater, stake in the resolution of the jurisdictional question in these cases.

WHEREFORE, the West Gulf Maritime Association respectfully prays that its motion for leave to file a Brief Amicus Curiae be granted.

Respectfully submitted,

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Of Counsel:

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BRIEF AMICUS CURIAE OF WEST GULF MARITIME ASSOCIATION

STATEMENT OF INTEREST

The West Gulf Maritime Association is composed of some 66 stevedoring companies, steamship owners, agents and operators, and terminal freight handling

companies located geographically from Lake Charles, Louisiana to Brownsville, Texas. Much of the employment provided by these companies is in the area adjoining navigable waters in the ports of the West Gulf area, and the jurisdictional reach ashore of the Longshoremen's and Harbor Workers' Compensation Act as amended in 1972 is of crucial significance to these employers. Indeed, on January 1, 1977, compensation insurance rates on policies already issued covering wholly shoreside employees working solely in the areas adjoining navigable waters were increased by 138% based solely on the decision of the Court of Appeals for the Fifth Circuit in the *Ford* and *Bryant* cases, both of which arose out of the West Gulf area, reported *sub nom Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533 (5th Cir. 1976), pet. for cert. applied for, *P. C. Pfeiffer Co., et al v. Diverson Ford, et al,* No. 76-641. This increase was made because the Fifth Circuit extended coverage of the Longshoremen's Act to all employees engaged solely in warehouse freight handling on areas adjoining navigable waters. Next to direct waterfront labor costs, the cost of workmen's compensation insurance is the next largest item of cost for the Association's members. Cargo transfer operations within the area adjoining navigable waters are the actual business of many of the members of the West Gulf Maritime Association, and the Association is vitally concerned with the extension of federal jurisdiction into this area.

The *Caputo* and *Blundo* cases are the first cases to reach this Court on the question of post-1972 shoreside jurisdiction under the Longshoremen's Act and are therefore likely to have a dramatic, if not completely final, precedential effect. Over 90% of the general cargo long-

shore gangs employed in the Port of Houston work on breakbulk cargo (bales of cotton, bags of rice, boxes or cartons of cargo), and the apparent factual importance of containerization in the New York area, from which *Caputo* and *Blundo* arose, may tend to obscure the importance of breakbulk cargo practices to the jurisdictional question on a nationwide basis.

The West Gulf Maritime Association appreciates this opportunity to present its views to the Court and to suggest a simple two-question test which it believes would quickly, easily and precisely resolve substantially all, if not all, of the jurisdictional questions relating to shoreside injuries under the 1972 Amendments to the Longshoremen's Act in full accord with Congressional intent.

ARGUMENT

1. CARGO TRANSFER OPERATIONS AND THE LONGSHOREMEN'S ACT

The transfer of a quantity of any commodity (cargo) from point A to point C is fundamentally a repetitive movement from A to C of an increment of the commodity until the transfer is accomplished. The movement may be continuous from A to C or for convenience may be in stages from A to B and from B to C. For efficiency's sake, the person carrying the increment of the cargo may enlist the aid of other persons and form in effect a bucket brigade, passing each repeated increment of cargo from person to person until the final destination or a resting point at the end of the stage is reached. The transfer of waterborne cargo to or from land transportation is precisely such a movement.

The objective is to move increments of cargo between land transportation and water transportation. Typically, it is more convenient to move the cargo in stages, storing it for accumulation purposes near the water's edge since more increments of cargo can usually be carried aboard a ship than can be carried aboard any unit of land transportation. Inbound cargo coming into the port is typically moved from aboard the ship to the accumulation point (point of rest)[1] and then distributed from the accumulation point to the various units of land transportation. Conversely, outbound cargo going out of the port is accumulated from units of land transportation at a point in an area adjoining the water until a shipload is amassed, and the increments of cargo are then moved from the accumulation point of rest onto the ship.

In practice, a person carrying increments of cargo from the accumulation point of rest onto the ship and vice versa might pass back and forth between the ship and the dock many times in the course of his work. Similarly, a bucket brigade between the accumulation point of rest and the ship's hold would have some workers on the ship, some workers on the dock apron and some in the adjoining area at the accumulation point of rest. A worker might have any spot in the bucket brigade chain of employees and so might be on the ship or on the dock or in the adjoining area and still be doing the same work—loading or unloading the ship! Please refer to Figure I.

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1. This functionally significant point of rest is and has been well known on the waterfront as the dividing line where one group of workers stores cargo for another group to load onto land transportation if the cargo is inbound, or onto water transportation if it is outbound from the United States.

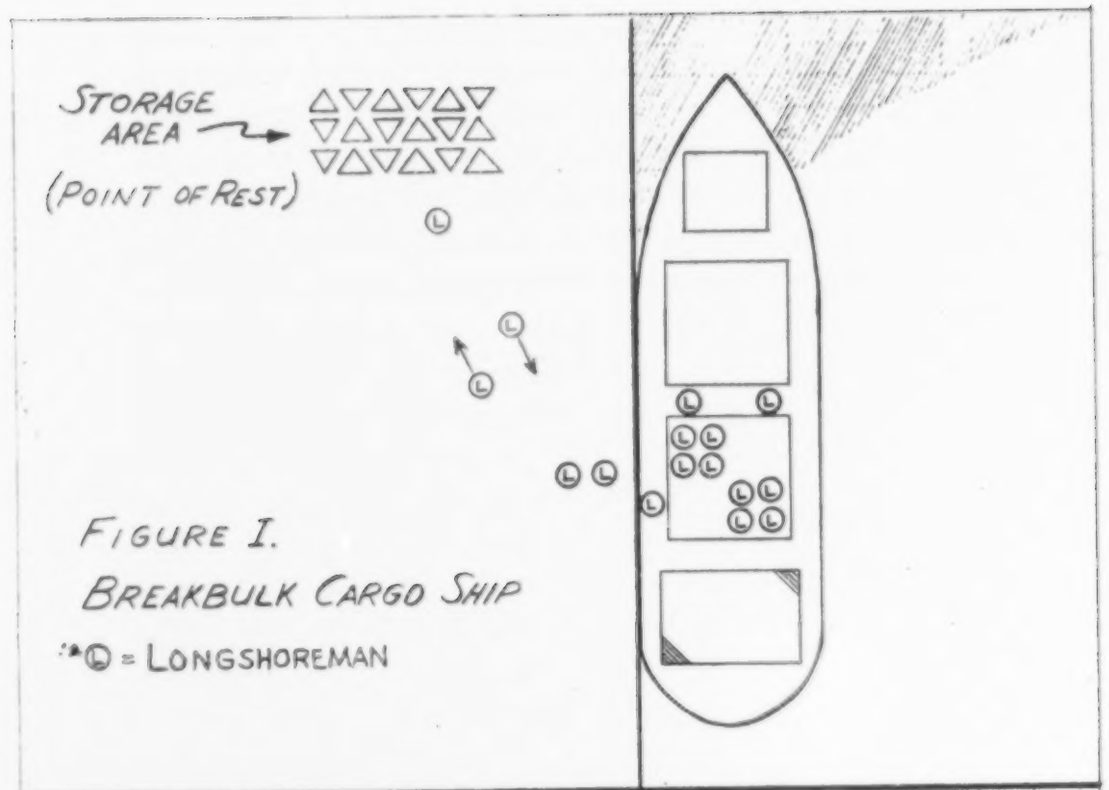

FIGURE I.
BREAKBULK CARGO SHIP

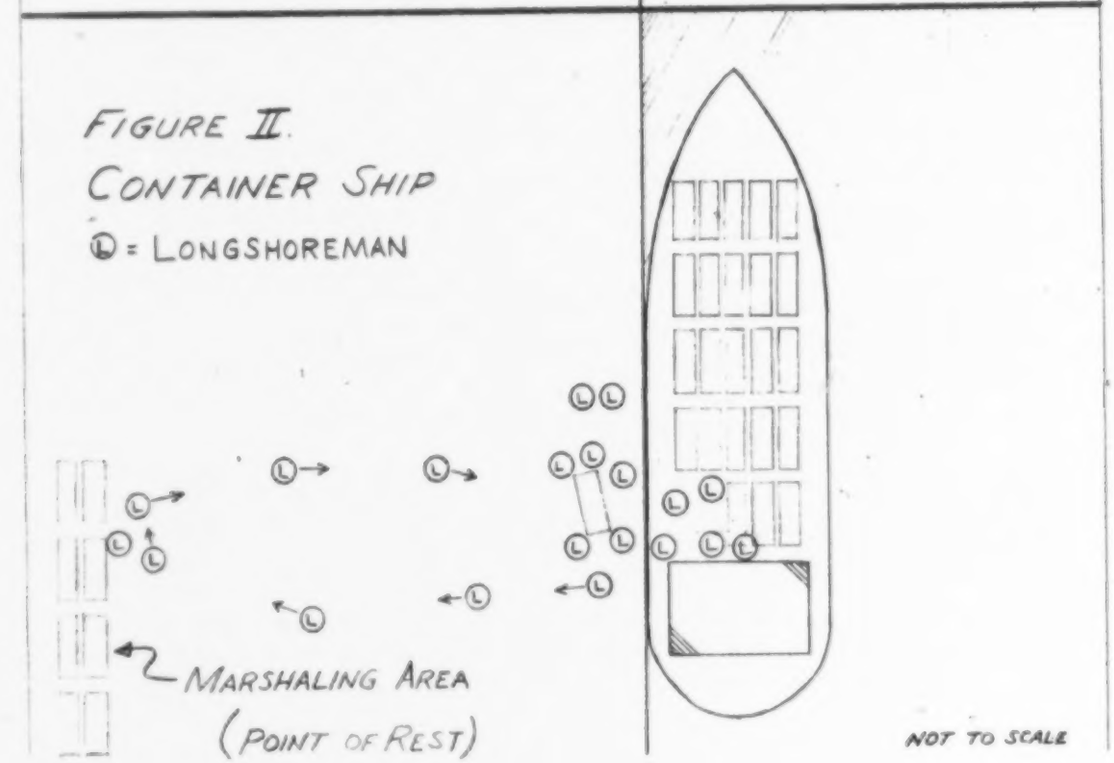

FIGURE II.
CONTAINER SHIP

In the West Gulf area, and nationwide as is shown in the National Association of Stevedores National Survey,[2] the modern workers in the sophisticated bucket brigade moving cargo from waterborne transportation to the accumulation point in the adjoining area are longshoremen, and the brigade itself is known as a longshore gang. Historically, many members of the longshore gang were most efficiently stationed aboard ship to break the increments of cargo out of the ship's hold and lift them onto the dock, where other members of the gang would move them to the accumulation point of rest in the adjoining area to await land transportation. Please refer to Figure I. The Longshoremen's & Harbor Workers' Compensation Act[3] was enacted by Congress in 1927 to provide a workmen's compensation remedy for those gang members stationed aboard ship where the state laws were incompetent to provide such a remedy.[4] The federal remedy applied only aboard ship,[5] and as the disparity between federal and state benefits grew, longshore gang members would have different remedies according to whether they were working aboard ship or ashore, and the remedy changed as the longshore gang members moved from ship to shore and back again. Moreover, with the advent of containerization, relatively more members of the longshore gang

2. National Association of Stevedores Survey, pp. 7a, *et seq.* of the Appendix to the Memorandum of National Association of Stevedores in Response to Petition for a Writ of Certiorari in No. 76-730 pending before this Court.

3. 33 U.S.C.A. §§ 901, *et seq.*

4. *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 61 L.Ed. 1086, 37 S.Ct. 524 (1917); *State Industrial Commission v. Nordenholt Corp.,* 259 U.S. 263, 66 L.Ed. 933 (1922); *Nacirema Operating Co. v. Johnson,* 396 U.S. 212, 24 L.Ed.2d 371, 90 S.Ct. 347 (1969).

5. *Nacirema, supra.*

were most efficiently stationed on shore, outside the coverage of the more generous federal Longshoremen's Act, and thus the anomaly of one remedy for a longshore gang member while working aboard ship but a lesser remedy for the same man while working ashore was emphasized. Please see Figure II. The accumulation point of rest for containers is known as a marshalling area.[6]

The transfer of cargo, whether breakbulk or containerized, from the accumulation point of rest onto land transportation is not performed by the longshore gang bucket brigade anywhere in the United States. In the West Gulf it is performed by warehousemen working under a separate contract out of a union local separate and distinct from the longshore gang's contract and union local. In other parts of the country these workers are designated "extra labor," or terminal labor, but in no case are they part of the longshore gang.[7] These workers never go aboard a ship in the course of their work, and conceptually could not go aboard ship in the course of their work between the accumulation point of rest and the land transportation. See Figure III.[8] They are in an entirely

6. Containers are large metal boxes ranging in size up to forty feet in length and typically capable of being placed on wheels and functioning as a truck trailer. The contents of a container may or may not be removed from the container (or placed into the container) while in an area adjoining navigable waters, but a marshaling area accumulation point of rest is generally the place in the area adjoining the water to or from which containers are moved off of or onto a ship.

7. National Association of Stevedores Survey, cited above in note 2.

8. The representation in Figure III reflects the facts of the *Caputo* case, No. 76-444. The only participants in the truck loading were Caputo (standing on the truck), the truck driver (also on the truck), a checker (presumably near the truck), and a forklift operator (moving cargo to the truck from the accumulation point of rest where it had been stored by a longshore gang who had unloaded it from a ship some five days before). Appendix A in No. 76-444, p. 37.

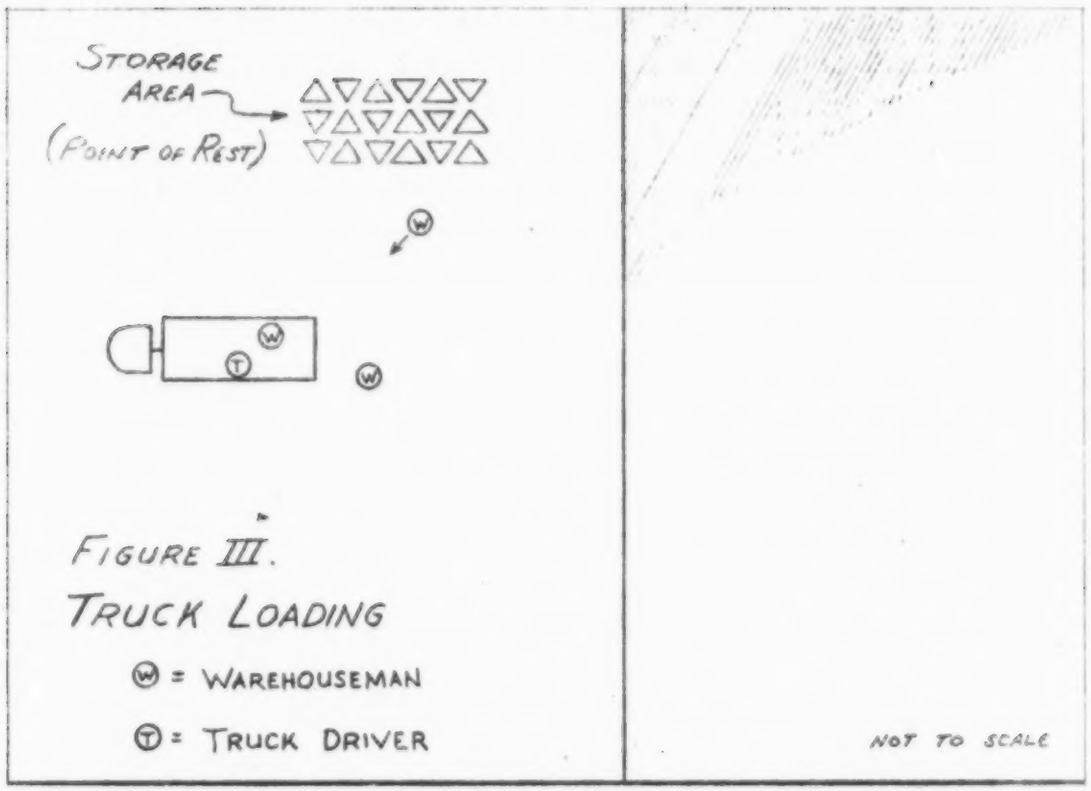

FIGURE III.
TRUCK LOADING

different bucket brigade (functioning as warehousemen) between the accumulation point of rest and the land transportation.[9] Such warehouse workers were never covered by the Longshoremen's Act, and so were never subject to the anomaly of two different compensation remedies.[10] In the present cases, Ralph Caputo (No. 76-444)

9. Sometimes cargo is moved directly between land and water transportation without being put down at any accumulation point on the dock or adjoining area. In such cases there is no warehouse function to be performed, and the longshore gang bucket brigade moves the cargo directly between the ship and the land transportation (either truck or railroad).

10. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 24 L.Ed. 2d 371, 90 S.Ct. 347 (1969).

and Carmelo Blundo (No. 76-454) were functioning as warehousemen between the accumulation point of rest and the land transportation.[11]

2. MARITIME EMPLOYMENT AND THE AMENDED ACT

The 1972 Amendments to the Longshoremen's Act substantially increased the benefits under the federal act and would have exacerbated the water's edge anomaly recognized by the Court in *Nacirema*. Congress therefore undertook to cure that anomaly[12] by extending coverage shoreward into the adjoining area to cover longshore gang members all the way to the accumulation point of rest, which was the shoreward limit of activity for those subject to the pre-amendment anomaly. While this expanded the situs of Longshore Act coverage, Congress added the requirement of "maritime employment" to the definition of those employees eligible for the benefits of the Act. Why was this "maritime employment" STATUS requirement added? The answer is in order to restrict the expansion of coverage to those previously subject to the

11. This functional division of labor at the accumulation point of rest between the longshore gang (Figures I and II) and the warehouse group (Figure III) is not something dreamed up by an ingenious terminal operator or stevedore employer or its lawyer after the 1972 Amendments in an attempt to limit the Act's jurisdiction ashore. It has existed to counsel's own personal knowledge in the West Gulf since 1949, and has been explicitly spelled out in the West Gulf Maritime Association's (and its predecessor's) labor contracts with the deepsea longshore locals and the warehouse locals at least since 1934.

12. "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." S. Rep. 92-1125, H. Rep. 92-1441, 1972 U.S. Code Cong. and Administrative News, p. 4708, attached hereto as Addendum A, pp. 21-24.

pre-amendment non-uniformity anomaly, i.e., those having their remedy determined by the "fortuitous circumstance" of whether their injury occurred over water or on land, for this was the mischief which Congress intended to cure. That this was in fact the Congressional intention is clearly stated in the last two sentences of the Committee Reports from both the Senate and the House:

> ". . . Likewise, the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters is not covered even if injured on a pier adjoining navigable waters."

In these two statements, Congress makes it clear that in extending coverage of the Act ashore, (1) that an employer must be engaged in "maritime employment," and (2) that an employer is not engaged in "maritime employment" if none of his employees work, in whole or in part, on navigable waters even though his employees work on and are injured on an area ashore adjoining navigable waters. Thus, an employer who does only shoreside work, i.e. employs men to work only in the warehouse bucket brigade between the accumulation point of rest and land transportation is not engaged in "maritime employment." As the work the warehouse group is doing does not make their employer engaged in "maritime employment," it necessarily follows that the employees in the wholly shoreside warehouse group, such as Blundo and Caputo, are not engaged in "maritime employment."

This is precisely what this Court said the term "maritime employment" meant, first in 1930 in *Nogueira,*[13] and again in 1953 in *O'Rourke.*[14] In both cases, this Court expressly held that the term "maritime employment" as used in the Longshoremen's Act means *that employment at least a part of which is performed upon the navigable waters of the United States.* In *O'Rourke,* this Court held a railroad brakeman was engaged in "maritime employment" within the meaning of the Longshoremen's Act only because a part of his work on the date of his accident was performed on a car float on navigable waters. The majority opinion so held despite the vigorous protest of the dissenting justices that "If this railroad employee had been doing his braking job on land, no one would have thought he was engaged in anything but railroad employment," and that it did not "become maritime employment because it happened over navigable waters."[15]

O'Rourke was a reaffirmation of this Court's earlier decision in *Nogueira* in which it held that a railroad employee loading freight into railroad cars on a car float was in "maritime employment" within the meaning of the Act only because a part of his work on the day of the accident was upon the navigable waters of the East River in New York Harbor. The Court of Appeals for the Second Circuit in its opinion in *O'Rourke* had sought to limit and distinguish this Court's decision in *Nogueira* on the grounds that railroad employee Nogueira was en-

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13. *Nogueira v. New York, N.H. & H.R. Co.,* 281 U.S. 128, 74 L.Ed. 754, 50 S.Ct. 303 (1930).

14. *Pennsylvania R. Co. v. O'Rourke,* 344 U.S. 334, 97 L.Ed. 367, 73 S.Ct. 302 (1953).

15. *O'Rourke, supra,* dissenting opinion, 344 U.S. at 342, 97 L.Ed. at 374.

gaged in maritime employment because he was working as a freight handler in loading a "ship," whereas O'Rourke was doing the work of a railroad brakeman, duties which were "peculiar to the business of railroading alone." 194 F.2d 612, at 614. In holding that the work of both railroad employee Nogueira and railroad brakeman O'Rourke was "maritime employment" within the meaning of the Act solely because they were working on a car float on navigable waters, this Court in *O'Rourke* said:

> ". . . Whether the injury occurred to an employee loading freight into cars on the float, as in the Nogueira Case, or to one like respondent moving loaded cars from a float could make no difference. Both employments are maritime. See Nogueira v. New York, N.H. & H.R. Co., supra (281 U.S. at 134) . . ."[16]

It is perfectly clear, of course, that neither Blundo nor Caputo were engaged in "maritime employment" as thus defined by this Court and by Congress, as it is undisputed that the work they were doing with a warehouse gang at the time of their injuries would never require them or any other members of their warehouse group to do any work on navigable waters. It would follow, therefore, that if the only work their employers ever did was that which Blundo

16. This reaffirmation of the meaning of "maritime employment" in the Act by this Court is frequently overlooked because the Court in *O'Rourke* also made it clear that only the employer was required to meet the "maritime employment" test in that pre-1972 Amendment case, and held that even if O'Rourke himself could be labeled as only a railroad worker, the railroad was still an employer under the Act because it had other employees who satisfied the "maritime employment" requirement in the Act's definition of an employer. Once again, however, those other railroad employees who made the railroad an employer were found to be engaged in "maritime employment" only because a part of their work was performed upon navigable waters.

and Caputo were doing, their employers would never be engaged in "maritime employment" either.[17]

Prior to 1972, the employee had to meet only the situs test (injury on navigable waters), but in extending the Act's jurisdiction ashore, Congress added the requirement that the employee had to meet the same "maritime employment" status test which previously had to be met only by the employer.[18] In so doing it used precisely the same "maritime employment" term used previously in the Act. The legislative history of the 1972 Amendments demonstrates clearly that Congress did not intend to make any change in the meaning which this Court first gave to the term "maritime employment" in 1930. In the last two sentences hereinabove quoted from both Committee Reports,[19] Congress expressly states an employer is not engaged in "maritime employment" unless he has employees who work in the longshore gang bucket brigade, that is, in whole or in part on navigable waters. It therefore follows as night does the day, that employees such as Blundo and Caputo in the wholly shoreside warehouse group were not engaged in "maritime employment" be-

17. No contention appears in these cases that the respective employers were not "employers" within the meaning of the Act, apparently for the reason that each had other categories of employees who did actually work in part upon navigable waters.

18. 33 U.S.C.A. § 902(3).

19. For convenience here repeated:
". . . Likewise, the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e., a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters is not covered even if injured on a pier adjoining navigable waters." (Addendum A hereto, pp. 23-24)

cause the activity in which they were engaged for their employer at the time of the accident did not have to be performed in whole or in part on navigable waters.[20]

But these last two sentences in the Committee Reports are not the only ones which confirm that this Court's meaning of "maritime employment" was intended to be retained by Congress in extending the Act's jurisdiction ashore. Substantially all of the statements in the Committee Reports from both Houses of Congress, whether taken singularly or collectively, confirm that Congress intended to extend the Act's jurisdiction ashore only to those employees in the longshore group whose work is done in part on the navigable waters and in part on adjoining land areas:

1. "The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water." Addendum A, page 22.

   Only those employees in the longshore gang bucket brigade are subject to being assigned to

20. Thus, no new employers have been added to the coverage of the Act—all employers still have to have some employees engaged "in some form of maritime employment," that is, some employees who "work, in whole or in part, on navigable waters," and it is not enough if an employer simply has employees who work on or are injured only on piers adjoining navigable waters. After the 1972 Amendments, however, certain employees working on areas adjoining navigable waters may be covered, if they also meet this same "maritime employment" test—that is, only those employees engaged in the work of the employer which is performed in part upon navigable waters and in part on land come within the extended jurisdiction of the Act ashore.

work in whole or in part "over water" or "on land." None of the work of the warehouse function group is ever done "over water"—all is done solely "on land." Of necessity, therefore, no injury in the warehouse function group could ever occur "over water" and any such "fortuitous circumstance" could occur only to longshore gang enmployees.

2. "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." Addendum A, page 23.

   Obviously, a uniform compensation system exists now, as it did prior to the 1972 Amendments, for all of the warehouse function group as all of their work activities are performed solely on land. The lack of uniformity in benefits existed prior to the 1972 Amendments only for employees in the longshore group because a "part of their activity" on any given job could be over water and a part on land. The holding of the Court below in *Caputo* would destroy the very uniformity which Congress sought to establish by making the Longshore Act applicable to Caputo, but inapplicable to the consignee's truck driver who was working with Caputo in loading the truck. The assigned reason for doing so was that at other times and other places and on other days Caputo did in fact work in a longshore group in loading and unloading vessels, but because the truck driver apparently did not work at other times in a longshore group, he would be covered by the New York Compensation Act and not the Longshoremen's Act. Prior to the 1972

Amendments, both Caputo and the truck driver were uniformly covered by the compensation system of the State of New York while working together to load a truck under the circumstances here involved. Surely Congress evidenced no intent to provide a uniform compensation system for the longshore bucket brigade at the expense of destroying that uniformity for the warehouse function group! Only the application of this Court's Congressionally approved meaning of "maritime employment" provides a uniform system of compensation for the longshore group while leaving the warehouse group's pre-amendment uniform compensation system unaffected. No such non-uniformity has ever existed for the employees in the warehouse group because their work is confined, and always has been, to the landward side of the water's edge.

3. "To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area." Addendum A, page 23.

   Congress clearly describes only the work of the longshore gang bucket brigade in this example of the extent to which it intended to cover shoreside injuries, because the work of the warehouse function group never involves unloading cargo from a ship and immediately transporting it to a storage

   or holding area on the pier (the accumulation point of rest).

4. "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel just because they are injured in an area adjoining navigable waters used for such activity." Addendum A, page 23.

   Injury "on land" in an adjoining area where all the work of the warehouse group is performed is not enough—the employee must be engaged in loading or unloading "a vessel,"—the work done only by the longshore gang bucket brigade.

5. "Thus, the employees whose responsibility is only to pick up cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo." Addendum A, page 23.

   After the cargo has been "unloaded from the ship and immediately transported to a storage or holding area," by the longshore group (paragraph 3 above), Congress here states that the employees in the warehouse group who pick it up and load it on land transportation for transshipment inland are not covered, obviously because they do no work "over water" anymore than the purely clerical workers whose jobs do not require them to participate in the work of the longshore group loading or unloading the cargo from the ship.

6. "However, checkers, for example, who are directly involved in the loading or unloading functions are

covered by the new amendment." Addendum A, page 23.

Cargo checkers who work with the longshore gang bucket brigade are *"directly involved"* in loading or unloading cargo from a ship and thus perform a part of their work "over water" and a part "on land." For this reason only, Congress states its intent for them to be covered by the extension of jurisdiction ashore. Obviously, any cargo checkers, such as Blundo, who were working with a warehouse group are not *"directly involved"* in loading or unloading cargo from a ship and therefore would not be covered. Blundo could not possibly have been so *"directly involved"* as no ships are loaded or unloaded at the pier where he was injured.

In all six of the above quoted portions from the Committee Reports, Congress makes it clear that if the work of the employer which is being done by his employees requires those employees to work in whole or in part upon navigable waters (longshore gang bucket brigade), then, and only then, does it intend for the 1972 Amendments to make the Longshoremen's Act applicable to any injuries sustained by those employees whether "over water" or "on land" in an adjoining area. All six likewise make it clear that if the employer's work does not require its employees to work in whole or in part on navigable waters (warehouse function group), Congress does not intend to make the Act applicable to any injuries sustained by those employees even if they are injured in an area adjoining navigable waters.

3. THE TEST FOR SHORESIDE COVERAGE UNDER THE LONGSHOREMEN'S ACT

To summarize the foregoing position, Congress intended the post-amendment Longshoremen's Act to cover injuries ashore only to those persons which the pre-amendment Act had covered in part—only those persons who did not have a uniform compensation remedy prior to the 1972 Amendments. In the usual case, therefore, anyone whose work could require him to go on navigable waters and thus within the pre-amendment coverage of the Act will now be covered in the adjoining area shore. On the other hand, the mere fact of one's employment in an area adjoining navigable waters is not sufficient to invoke the coverage of the Act—the "maritime employment" status test which the employee must now meet requires that the work activity in which the employee was participating must have been done at least in part on navigable waters.

Thus, the test of shoreside coverage under the Longshoremen's Act resolves itself into two simple questions:

1. Did the activity in which the group of employees were directly involved at the time of the worker's injury have to be performed in whole or in part on navigable waters?

   If so, any of the group of employees would have been subject to assignment within the pre-amendment coverage of the Act on navigable waters, and so all were in maritime employment within the meaning of the Act and all were within the Act's post-amendment coverage whether injured aboard ship or in the adjoining area ashore.

2. Did the injury occur on an adjoining pier, etc?

   If so, and question 1 above is satisfied, the Longshoremen's Act applies to the injury ashore by virtue of the 1972 Amendments.

Such a simple two question test will quickly, easily and precisely resolve substantially all, if not all, of the jurisdictional questions relating to shoreside injuries under the 1972 Amendments in full accord with Congressional intent. The West Gulf Maritime Association respectfully commends it to the Court as the appropriate rule of law for those cases.

CONCLUSION

As the first question must be answered in the negative in both *Caputo* and *Blundo,* it is respectfully submitted that the decision of the Court of Appeals must be reversed and a judgment rendered that their injuries were not sustained within the jurisdiction of the Longshoremen's Act as amended in 1972.

Respectfully submitted,

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ADDENDUM A

S. Rep. 92-1125, pp. 12-13; H. Rep. 92-1441, pp. 10-11;
1972 U. S. Code Cong. and Administrative News
pp. 4707-4708

EXTENSION OF COVERAGE TO SHORESIDE AREAS

The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages. The following are the maximum limits on the compensation payable for permanent total disability in some maritime States:

California	$70.00
Florida	56.00
Hawaii	112.50
Louisiana	49.00
Maryland	85.68
Massachusetts	[1] 77.00
New Jersey	101.00
New York	80.00
Oregon	62.50
Pennsylvania	60.00
Texas	49.00

[1] Plus $6 for each dependent.

Also, under the laws of some states due to exemptions based upon the number of employees hired some workers might be uncovered in the event they are unfortunate victim of an injury.

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of long-

shoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person

who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

Supreme Court, U. S.
FILED
FEB 2 1977
MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-444

NORTHEAST MARINE TERMINAL COMPANY, INC.
and STATE INSURANCE FUND,
Petitioners,

—v.—

RALPH CAPUTO

—and—

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

No. 76-454

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Petitioner,

—v.—

CARMELO BLUNDO

—and—

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

OBJECTIONS TO FILING BRIEF AMICUS CURIAE BY WEST GULF MARITIME ASSOCIATION

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ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

OBJECTIONS TO FILING BRIEF AMICUS CURIAE BY WEST GULF MARITIME ASSOCIATION

The Respondents, Ralph Caputo and Carmelo Blundo, oppose the filing of the Brief Amicus Curiae by the West Gulf Maritime Association and in support of such opposition respectfully show:

1. The West Gulf Maritime Association, in our opinion, does not represent interests significantly different from that represented by the National Association of Stevedores to which we have given our prior consent to appear Amicus Curiae on behalf of the Petitioners. Counsel for West Gulf concedes (see footnote on page iv of its motion) that some members of its association are also members of the National Association of Stevedores. Since the National Association of Stevedores represents companies on all coasts of the United States, it is in a better position to present to this Court all the different factual circumstances which will be affected by the decision herein.

2. The West Gulf Maritime Association alleges that 90% of the general cargo longshore gangs in the Port of Houston work on breakbulk cargo and that the importance of containerization in the New York area may obscure the importance of breakbulk cargo practices.

3. Yet, the Brief for the National Association of Stevedores at pages 20-21, states that in its view, cargo moves in two distinct steps, "be it in breakbulk form or containerized," in all major ports of this country. While we disagree with the alleged two step movement of cargo, we do agree that all cargo moves through a port, "be it in breakbulk form or containerized," in the same general manner.

4. Further, counsel for Petitioner in Blundo in his Brief at page 23 states that although practices vary "somewhat"

from port to port, there is "substantial uniformity within the stevedore and marine terminal industries at United States ports."

5. For these reasons we declined to give our consent to the West Gulf Maritime Association to file an Amicus Curiae Brief.

WHEREFORE, Respondents, Caputo and Blundo, respectfully pray that the Motion of the West Gulf Maritime Association for leave to file a Brief Amicus Curiae be denied.

Respectfully submitted,

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see

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